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EDITOR'S NOTE

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No. 84-1640-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Marshall Mechanik, et al.

Docketed:
April 17, 1985

Court: United States Court of Appeals
for the Fourth Circuit

Vide:
84-1700
84-1704

Counsel for petitioner: Solicitor General

Counsel for respondent: Graves, Michael D., Fahringer, Herald Price, Crandall, Sarah Furey

Entry	Date	Note	Proceedings and Orders
1	Apr 17 1985	G	Petition for writ of certiorari filed.
2	May 15 1985		Brief of respondent Shabaz Shane Zarintash in opposition filed.
3	May 28 1985		DISTRIBUTED. June 13, 1985
4	May 28 1985	X	Brief of respondent Marshall Mechanik in opposition filed.
5	May 30 1985	X	Reply brief of petitioner United States filed.
6	May 31 1985	X	Brief of respondent Jerome Otto Lill in opposition filed.
7	Jun 17 1985		Petition GRANTED. The petitions for writs of certiorari in Nos. 84-1640 and 84-1700 are granted. The petition for writ of certiorari in No. 84-1704 is granted limited to Question 1 presented by the petition. The cases are consolidated and a total of one hour is allotted for oral argument.
			**********
8	Aug 1 1985		Brief of petitioners Marshall Mechanik, et al. filed. VIDED.
10	Sep 4 1985		Order extending time to file brief of respondent on the merits until October 4, 1985.
11	Sep 19 1985		Application for leave to file the government's brief on the merits in excess of the page limits filed (A-229)
12	Sep 19 1985		and order granting same by Burger, CJ., on Sept. 23, 1985. The brief may not exceed 60 pages.
13	Oct 7 1985		Order further extending time to file brief of respondent on the merits until October 10, 1985.
14	Oct 10 1985		Brief of petitioner United States filed. VIDED.
15	Oct 22 1985		SET FOR ARGUMENT, Monday, December 2, 1985. (3rd case).
16	Oct 23 1985		CIRCULATED.
17	Oct 25 1985		Record filed.
18	Oct 25 1985		Certified original record, 134 volumes in 9 boxes received.
19	Nov 16 1985	X	Reply brief of petitioners Marshall Mechirik, et al. filed.
20	Dec 2 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

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CLERK

No. 84-1640

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHALL MECHANIK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a facially valid indictment returned by a legally constituted and unbiased grand jury may be dismissed on the basis of a procedural irregularity in the grand jury proceeding.

2. If so, whether the indictment may be dismissed and a conviction reversed on the basis of such irregularity after an otherwise valid conviction has been entered by a petit jury.

3. Whether reversal of the conviction and dismissal of the indictment is an appropriate remedy in the absence of prejudice to the defendant resulting from the procedural irregularity in the grand jury proceeding.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, Jerome Otto Lill, Shahbaz Shane Zarintash, and Steven Henry Riddle were appellants below and are respondents herein. Mark Douglas Chadwick was also an appellant below, but his appeal was dismissed and he is accordingly not a respondent herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHALL MECHANIK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the court of appeals on rehearing en banc (App., *infra*, 1a-13a) is not yet reported. The panel opinion (App., *infra*, 14a-25a) is reported at 735 F.2d 136. The opinion of the district court (App., *infra*, 26a-53a) is reported at 511 F. Supp. 50.

JURISDICTION

The judgment of the en banc court was entered on March 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 6(d) of the Federal Rules of Criminal Procedure provides:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Following a three month jury trial in the United States District Court for the Southern District of West Virginia, respondents Mechanik, Riddle, Zarintash, and Lill were convicted of conspiracy, in violation of 18 U.S.C. 371 (Count One). In addition, respondent Mechanik was convicted of traveling in interstate commerce to carry on an illegal business enterprise, in violation of 18 U.S.C. 1952 (Count Ten), and respondent Lill was convicted of importing marijuana and possession with intent to distribute marijuana, in violation of 21 U.S.C. 952, 841 and 18 U.S.C. 2 (Counts Two and Four). Respondents Mechanik, Lill, and Zarintash were each sentenced to five years' imprisonment and fined $10,000. Respondent Riddle was also sentenced to five years'

imprisonment and was fined $5,000.[1] The court of appeals affirmed Mechanik's and Lill's convictions on the substantive counts and reversed the convictions of all respondents on the conspiracy count (App., *infra*, 4a).

1. In early June 1979, a DC-9 aircraft carrying approximately ten tons of marijuana crash landed at an airport near Charleston, West Virginia (App., *infra*, 28a). Among those aboard the plane was respondent Lill. Respondents Riddle, Mechanik, and Zarintash were waiting on the ground for the plane. About a week after the crash, on June 12, 1979, a federal grand jury was convened to investigate the crash. On June 14, 1980, after hearing some 30 witnesses, it returned an indictment consisting of one conspiracy count and seven substantive counts, and naming nine defendants, including all four respondents (*ibid.*).

Subsequently, the same grand jury, consisting of a nucleus of 17 of the same individual grand jurors,[2] met again on July 31, 1979, and August 2, 9, and 10, 1979, to hear additional evidence relating to the incident. The grand jury then unanimously returned a superseding indictment on August 10, 1979, similar in many respects to the first, but adding three defendants, adding two new substantive counts, and

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[1] Two other defendants, James F. Chadwick and Russell Kook, were acquitted. The jury was unable to reach a verdict as to Mark Douglas Chadwick, and a mistrial was declared. Four of the original 12 defendants pleaded guilty to the conspiracy count prior to trial. One defendant is a fugitive.

[2] One of the grand jurors who participated in the original indictment did not participate in the superseding indictment, and two individuals participated in the superseding indictment who had not participated in the original indictment (App., *infra*, 46a).

amending and expanding the conspiracy count. App., *infra*, 29a, 45a. The substantive counts under which respondents Mechanik and Lill were convicted were identical in both indictments.[3]

The principal differences between the original and the superseding indictment were in the conspiracy count (Count One), on which all four respondents were convicted. Each of the alterations in the conspiracy count, other than those redacted by the district court or mooted by the acquittal of Kook and of James Chadwick,[4] was supported by evidence from at least two independent sources. One of those sources was the testimony of Drug Enforcement Administration (DEA) Agents Jerry Rinehart and Randolph James. On August 10, 1979, these agents were placed under oath and testified together before the grand jury. Agent James testified principally concerning the suspects' travel and rental of Ryder trucks and James Chadwick's alleged involvement in the conspiracy, and Agent Rinehart testified principally about telephone calls made between the various suspects. The agents generally alternated their testimony, occasionally supplementing each other's answers. See App., *infra*, 29a-32a.

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[3] Gregory Louis McCafferty was charged in Counts Two and Four of the original indictment, but not in the corresponding counts of the superseding indictment. App., *infra*, 46a & n.10.

[4] At the conclusion of the government's case in chief, the district court redacted the superseding indictment to conform to its rulings on the government's motion to dismiss a portion of the indictment and the defendants' motions to strike and for judgment of acquittal. Portions of the superseding indictment that had been changed from the original indictment also pertained to defendants Kook and James Chadwick, who were acquitted by the jury.

2. The trial began on February 19, 1980, and concluded on July 3, 1980. During the second week of trial, on February 28, 1980, Agent Rinehart testified as a government witness, at which time the government furnished respondents with a portion of the transcript of his grand jury testimony. The transcript disclosed that on August 10, 1979, Agent Rinehart had testified before the grand jury simultaneously with Agent James. Respondents thereupon moved for dismissal of the indictment on the ground that Fed. R. Crim. P. 6(d) had been violated by the presence of two witnesses before the grand jury at the same time. App., *infra*, 27a-28a. On March 14, 1980, the district court denied this motion.[5] On May 22, 1980, respondents moved for rehearing on their motion to dismiss the indictment, which motion was taken under advisement. On August 15, 1980, after the trial had concluded, the district court denied the motion.

The district court found that the simultaneous appearance of both DEA agents before the grand jury violated Fed. R. Crim. P. 6(d) (App., *infra*, 33a-38a). However, the court concluded—after a meticulous examination of the original and the superseding indictments and the evidence supporting the changes in the latter—that "the existence of actual prejudice as to the conspiracy count is so utterly remote and the absence of actual prejudice as to the * * * substantive counts is so plain that a mere possibility

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[5] While the trial continued, respondents filed a notice of appeal and sought a stay pending appeal. The stay was denied. On April 10, 1980, the court of appeals denied respondents' petition for a writ of mandamus and for a writ of prohibition.

of prejudice can appropriately be disregarded" (App., *infra*, 51a).

The court noted (App., *infra*, 38a, 40a) that Rule 6(d) serves two important public purposes: to protect the secrecy of grand jury proceedings and to guard against undue influence upon grand jury witnesses or the grand jurors. The court found that "[r]ealistically, * * * the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case" (App., *infra*, 40a), but that the "joint witness approach * * * tended to inhibit the effective evaluation of the agents' testimony" (*id.* at 43a).[6] In light of the sequence of events in this case —an original, untainted indictment followed by a superseding indictment—the court was able to conclude that "actual prejudice is conceivable" only "in the sense that all things are possible" (*id.* at 51a). After reviewing each alteration in the indictment and the evidence supporting it, the court stated that "[i]nsofar * * * as the joint testimony of Agents Rinehart and James ultimately proved to be material, the grand jury also had before it ample independent evidence to support a probable cause finding" (*ibid.*). The court thus found that "the grand jury would, in my view, undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately" (*ibid.*).

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[6] The district court stated that the agents' simultaneous testimony "tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge" of the agents and to "contrast and compare" their testimony (App., *infra*, 41a).

The district court observed that, had it been facing the issue prior to trial, "dismissal might well be decreed as the proper and prudent course" (App., *infra*, 51a); however, in light of the fact that "a three-month trial [had been] conducted at enormous expense to the United States and the defendants," the remedy of dismissal of the indictment after conviction, in the absence of prejudice to the defendants, was not required (*ibid.*).

Noting that "Rule 6(d) does not prescribe the sanction to be imposed for its violation," the district court fashioned a remedy "appropriate to the circumstances" (App., *infra*, 52a). To guarantee observance of the one-witness rule in future proceedings, the court directed the prosecution "routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled" (*ibid.*). The district court observed that Jencks Act disclosure (18 U.S.C. 3500) and other occasions when the court must review grand jury material will serve to "monitor the accuracy of the reporting process" (App., *infra*, 52a-53a).

3. A divided panel of the court of appeals reversed respondents' conspiracy convictions. App., *infra*, 14a-22a. Relying on its view that "courts consistently have held that the presence of one witness during the testimony of another witness at grand jury proceedings taints an indictment," the court below "reject-[ed] the argument that defendants must show that a rule 6(d) violation prejudiced them before an indictment may be dismissed" (*id.* at 18a-19a). The court reasoned that Rule 6(d) is "plain and unequivocal in limiting who may appear before a grand jury," and that requiring a defendant to show prejudice would "impose a difficult burden that could un-

dermine the protection the rule provides" (App., *infra*, 19a). As a basis for distinguishing its decision in *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983), in which the court seemingly rejected the application of a per se rule to violations of Rule 6(d), the court of appeals concluded that the agents' joint testimony here "could have" bolstered each agent's credibility and "could have" influenced the grand jurors' decision to return the superseding indictment (App., *infra*, 20a).

The court of appeals panel affirmed the convictions of respondents Mechanik and Lill on the substantive counts of the indictment. Because the three substantive counts in the superseding indictment were identical to counts returned in the original indictment by the same grand jury, the panel found "a valid basis for the charges they set forth that was independent of the unauthorized joint appearance of the agents," and held that the "invocation of a per se rule of invalidity is inappropriate for [those] counts" (App., *infra*, 21a).

Judge Hall dissented from the reversal of the conspiracy convictions. App., *infra*, 23a-25a. Noting that on appeal appellants had "been unable to advance any basis for a claim of prejudice" (*id.* at 24a), Judge Hall relied on the "carefully reasoned opinion" (*id.* at 23a) and "detailed analysis" (*id.* at 24a) of the district court to conclude that appellants had not suffered demonstrable prejudice. Moreover, he found the majority result "particularly undesirable here, where the part of the superseding indictment found to be bad closely tracked the charging portion of the original indictment and in no way surprised or prejudiced the defendants" (*id.* at 25a).

The full court ordered rehearing en banc (App., *infra*, 54a-55a). On rehearing, seven of the judges voted to reverse the conspiracy convictions for the reasons stated in the panel opinion (*id.* at 2a). Two of the seven—Judges Widener and Phillips—dissented from the affirmance of the convictions of respondents Mechanik and Lill on the substantive counts. In their view, the indictment on these counts should have been dismissed "for the same reasons" that the conspiracy count was dismissed (*ibid.*).

Judge Wilkinson, joined by Judges Russell, Hall, Chapman, and Sneeden, dissented from the en banc judgment "insofar as it invokes 'a per se rule of invalidity' to reverse the convictions and dismiss the conspiracy count in the superseding indictment" (App., *infra*, 5a). Although agreeing that Rule 6(d) had been violated, the dissenters stated (App., *infra*, 13a) that "[t]he comparison of testimony and the history of this particular grand jury fully support the determination that the defendants suffered no prejudice through the joint appearance of the agents. The other factors were properly weighed, and the relief granted by the [district] court was appropriate to the situation." The dissenters pointed out that under the majority's per se approach, "[w]ithout cause or compensation, the public will now pay the price, and convicted criminal defendants will now reap the windfall benefits, of a prosecutorial mistake" (*id.* at 5a).

REASONS FOR GRANTING THE PETITION

Two DEA agents appeared as witnesses before the grand jury at the same time, in violation of Rule 6 (d) of the Federal Rules of Criminal Procedure. The question presented is whether such an infraction may ever serve as the basis for dismissing an indictment,

and especially for reversing an otherwise valid conviction reached by a petit jury after a three month trial.

This Court has frequently considered cases in which criminal defendants have sought dismissal of an indictment after conviction on the basis of one or another alleged defect in the grand jury proceedings. With narrow exceptions not applicable here, the Court has consistently held that such defects are not a sufficient basis for attack upon an indictment; the cost to the criminal justice system of permitting such challenges to the grand jury proceedings is too great, and the legitimate protection it would afford defendants is slight. The en banc court below has disregarded this Court's teaching, even going so far as to hold that a procedural irregularity in the grand jury proceeding is a per se basis for reversal of the conviction and dismissal of the indictment. It is our position, (1) that a procedural irregularity, such as a violation of Rule 6(d), is never a sufficient basis for dismissing a facially valid indictment returned by a legally constituted and unbiased grand jury; (2) that, even if such irregularity could warrant dismissal of an indictment before trial, it would not justify reversing an otherwise valid conviction; and (3) that, in any event, dismissal of an indictment is an inappropriate sanction in the absence of substantial prejudice to the defendants.

This case is of considerable importance to the administration of the criminal justice system because of the frequency with which criminal defendants raise challenges to the way grand jury proceedings were conducted and the substantial portion of criminal justice system resources allocated to litigation of such challenges at every level of the judicial system, as

well as the grave cost of reversing otherwise valid convictions on such grounds.

1. This Court has held that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *Lawn* v. *United States*, 355 U.S. 339, 349 (1958); see also *Holt* v. *United States*, 218 U.S. 245 (1910); *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974); *Bracy* v. *United States*, 435 U.S. 1301, 1302-1303 (1978) (Rehnquist, Circuit Justice). In *Costello*, the Court considered whether the validity of an indictment was impaired by an asserted substantive deficiency—the exclusive reliance on hearsay evidence before the grand jury. The Court held that it was not. Justice Black, writing for the Court, stated that "[i]n a trial on the merits, defendants are entitled to a strict observation of all the rules designed to bring about a fair verdict" (350 U.S. at 364), but that "[n]either justice nor the concept of a fair trial" requires a preliminary inquiry into the evidentiary basis for the grand jury's return of an indictment. On the contrary, such a requirement "would result in interminable delay but add nothing to the assurance of a fair trial" (*ibid.*).

On a similar rationale, the Court has rejected challenges to grand jury indictments on other evidentiary grounds. See *Holt* v. *United States*, *supra* (indictment may not be quashed on the ground that it was supported by incompetent evidence); *Lawn* v. *United States*, *supra* (defendant is not entitled to hearing to determine whether the grand jury used evidence obtained in violation of his Fifth Amend-

ment rights); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966) (presentation of "tainted evidence" to the grand jury is not a basis for dismissal of indictment). See also, *e.g.*, *United States* v. *Adamo*, 742 F.2d 927, 935-936 (6th Cir. 1984) (indictment cannot be challenged on the grounds that the prosecutor used evidence later found to be perjured or withheld exculpatory evidence from the grand jury; *United States* v. *Wright*, 667 F.2d 793, 796 (9th Cir. 1982) (prosecutor's erroneous instruction on a material aspect of the law does not warrant dismissal of indictment); *United States* v. *Ruyle*, 524 F.2d 1133 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976) (indictment valid despite prosecutor's failure to present exculpatory evidence to the grand jury); *Silverthorne* v. *United States*, 400 F.2d 627, 634 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971) (indictment cannot be challenged on basis of prejudicial publicity); *Coppedge* v. *United States*, 311 F.2d 128, 131-132 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963) (Burger, J.) (indictment valid despite perjured testimony before grand jury).[7]

The holding of the court below clearly conflicts with these decisions. It is undisputed that the indictment here was returned by a legally constituted and unbiased grand jury. The indictment was, accordingly, "enough to call for trial of the charge on

[7] But see, *e.g.*, *United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979) (indictment dismissed for prosecutor's failure to present exculpatory evidence, improper comments, and other prejudicial conduct before the grand jury); *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974) (indictment dismissed because of perjured testimony before grand jury); *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972) (conviction reversed because of grand jury's sole reliance on hearsay testimony not identified as such).

the merits." *Costello*, 350 U.S. at 363. The simultaneous presence of two witnesses before the grand jury here is no more compelling a reason to dismiss this indictment than were the evidentiary flaws alleged in *Costello*, *Holt*, *Lawn*, or *Blue*. It is possible, in the abstract, that the joint testimony of two witnesses gained "added persuasiveness" because the witnesses were able "instantly to supplement each other's testimony" (App., *infra*, 41a). It may thus be true that, to a limited degree, the Rule 6(d) violation "tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge" of Agents James and Rinehart (App., *infra*, 41a).[8] However, the same might be said of a prosecutor's decision to present only hearsay evidence to the grand jury; the grand jurors' ability to assess the credibility and personal knowledge of the declarants is substantially impaired. And something similar might be said of a prosecutor's use of incompatent, unconstitutionally obtained, or "tainted" evidence; in any such instance the grand jurors' ability to assess the strength of the government's case is impaired or distorted by potential reliance upon improper evidence. Nonetheless, in any such case, an

[8] Of course, under the circumstances of this particular case, the district court was able to conclude that even this possibility of prejudice was "utterly remote" (App., *infra*, 51a). But even if there had been no untainted original indictment, and even if the alterations in the indictment were not supported by "ample independent evidence" (*ibid.*), the potential prejudice stemming from the procedural violation in this case would be of no greater magnitude than that in *Costello*, *Blue*, and like cases. Indeed, it is not intuitively obvious that the grand jury could not in some circumstances *better* perceive the truth by being able to observe the interaction of two witnesses giving testimony together.

indictment by a legally constituted and unbiased grand jury is not subject to challenge on such a ground.

Other, less disruptive, remedies are available to ensure compliance with the procedural rules applicable to grand juries. Rule 6(e)(2) specifically provides that "a knowing violation of Rule 6 may be punished as a contempt of court." Other sanctions might include directing the prosecutor to show cause why he should not be disciplined or publicly chastising him by identifying him in the court's opinion. *United States* v. *Hasting*, 461 U.S. 499, 506 n.5 (1983). The district court below crafted a remedy that would be acceptable in appropriate circumstances, and that would appear to be more effective than dismissal of the indictment in enforcing the Rule in future cases. See page 7, *supra*. These alternative remedies would better satisfy the "general rule" established in *United States* v. *Morrison*, 449 U.S. 361, 364 (1981), that "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," including society's interest in the administration of justice.[9]

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[9] There is no claim here that the joint appearance of Agents Rinehart and James could have resulted in any continuing prejudice to respondents' ability to obtain a fair trial. Accordingly, the most specific and tailored remedy would be to require the government to correct the error—that is, to present its case anew to a grand jury in compliance with Rule 6(d)—but not to reverse a fair and untainted conviction if a procedurally regular indictment is obtained. Cf. *Waller* v. *Georgia*, No. 83-321 (May 21, 1984), slip op. 9-11. Of course, such a remedy would be of little practical benefit to respondents. However, this Court has squarely rejected the notion that merely "because other remedies would not be fruitful"

2. There are additional reasons to be especially reluctant to permit criminal defendants to obtain dismissal of their indictment where, as here, they have already been convicted beyond a reasonable doubt by a petit jury. The cost to society is, of course, much greater. In addition to the "interminable delay" predicted by the *Costello* Court if defendants could "always insist on a kind of preliminary trial" to determine whether there were flaws in the grand jury proceeding (350 U.S. at 363, 364), there is the additional cost of overturning the results of an otherwise valid trial on the merits. In this case, as the district court observed (App., *infra*, 51a), reversal would "confer[] a windfall benefit on four defendants who stand convicted after a three-month trial conducted at enormous expense to the United States and the defendants." It also not infrequently happens that because of the passage of time, critical evidence will be unavailable to the prosecution at a retrial, resulting in inability to establish guilt at the second trial even though this was proven beyond a reasonable doubt at an error-free first trial. Courts should be most reluctant to impose such an extravagant cost on society except when supported by compelling interests.

On the other side of the balance, the legitimate value to the defendant of obtaining review of the procedural regularity of the grand jury process is diminished if it takes place after he has stood trial and been convicted. The basic purpose of the grand jury is "to provide a fair method for instituting criminal proceedings against persons believed to

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the courts must impose "the most drastic remedy" of dismissal of the indictment. *United States* v. *Morrison*, 449 U.S. at 365-366 n.2.

have committed crimes." *Costello*, 350 U.S. at 362. The grand jury "serves the 'dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.'" *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 4, quoting *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972). Once a petit jury has determined beyond a reasonable doubt that the defendant is guilty as charged, it can be presumed that the abuse against which the grand jury provides protection has not occurred: the government has not launched an "unfounded criminal prosecution[]" or haled citizens into court on criminal charges for which there was not probable cause.

In this case, a petit jury has convicted respondents of conspiracy and substantive offenses in connection with the unlawful importation of approximately ten tons of marijuana. There is no suggestion that respondents' trial was in any way unfair or defective. Since there was sufficient evidence to convict respondents beyond a reasonable doubt, it follows, *a fortiori*, that there was probable cause to institute charges against them. *United States* v. *Romano*, 706 F.2d 370, 374 (2d Cir. 1983). To examine the procedural regularity of the grand jury at this stage would be like conducting a proceeding to determine, in a civil case after final decision, whether the losing party should have been granted summary judgment. The issue is of no further consequence; it has merged into the final judgment of conviction. As Justice Stewart has observed, "[a] grand jury proceeding * * * is not a proceeding in which the guilt or innocence of a defendant is determined, but merely one to decide whether there is a prima facie case

against him. Any possible prejudice to the defendant * * * thus disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt." *Rose* v. *Mitchell*, 443 U.S. 545, 575 (1979) (Stewart, J., concurring).

Rose v. *Mitchell*, *supra*, demonstrates this proposition. In *Rose*, this Court considered whether a conviction free of trial error should be set aside when it is found that persons of the defendant's race were systematically excluded from service as grand jury foreman. The Court rejected, in that context, an argument similar to that we make in the instant case. However, in doing so, the Court did not dispute the proposition, put forward by Justice Stewart in concurrence, and earlier by Justice Jackson in dissent in *Cassell* v. *Texas*, 339 U.S. 282, 298-305 (1950), that a defendant who has been convicted by a properly constituted petit jury can have "suffered no possible prejudice" from discrimination in the grand jury venire (443 U.S. at 552).[10] The basis for

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[10] The Court summarized Justice Jackson's argument as follows (443 U.S. at 552 (citations omitted)):

> Unlike the petit jury, the grand jury sat only to determine probable cause to hold the defendant for trial. It did not consider the ultimate issue of guilt or innocence. Once a trial court heard all the evidence and determined it was sufficient to submit the case to the trier of fact, and once that trier determined that the defendant was guilty beyond a reasonable doubt, Mr. Justice Jackson believed that it "hardly lies in the mouth of a defendant . . . to say that his indictment is attributable to prejudice." "Under such circumstances," he concluded, "it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict."

the Court's holding in *Rose* was not that the defendant was actually injured by the discriminatory selection of grand jury foreman, but that "discrimination on the basis of race in the selection of members of a grand jury * * * strikes at the fundamental values of our judicial system and our society as a whole" (*id.* at 556). The Court concluded that the cost of reversals of otherwise lawful convictions is "outweighed" by the Court's "strong policy" of "combatting racial discrimination in the administration of justice" (*id.* at 558).[11]

The *Rose* Court's answer to Justices Jackson and Stewart has no analogue here. A violation of Rule 6(d) cannot, in any sense, be deemed to "strike at the fundamental values of our judicial system and our society as a whole." There is no "strong policy" of enforcing Rule 6(d) that would justify reversals of convictions where there is no possibility that the purpose for which the grand jury is constituted has been thwarted. *Rose* is an exception to the general rule, predicated on the unique considerations of racial discrimination in grand jury selection; where those unique considerations do not pertain, the general rule itself should be given effect.

This Court has recently granted a petition for a writ of certiorari in a case reopening the question answered in *Rose* v. *Mitchell*, *supra*. *Vasquez* v. *Hillery*, cert. granted, No. 84-836 (Mar. 4, 1985). This action by the Court reinforces the substantiality of

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[11] Significantly, in *Hobby* v. *United States*, No. 82-2140 (July 2, 1984), the Court refused to reverse the conviction of a white male who challenged the alleged exclusion of women and blacks from the position of federal grand jury foreman. The Court noted (slip op. 10) that "[l]ess draconian measures will suffice to rectify the problem."

the question here, which as a practical matter is far more likely to arise in the everyday administration of federal criminal justice. The problem of racial discrimination in grand jury selection happily arises but rarely, especially in the federal system, where Congress has provided an effective remedy. 28 U.S.C. 1861 *et seq.* (*Vasquez* itself involves a grand jury convened some 23 years ago.) Claims of procedural irregularity such as that involved here are, by contrast, relatively frequent. If the proper remedy for discriminatory grand jury selection presents a certworthy question, it is all the more vital for the Court to clarify the proper remedy for the far more frequent run of procedural irregularities.[12]

3. Even assuming, arguendo, that a Rule 6(d) violation may in some cases be sufficient ground for dismissal of an indictment prior to trial or even for reversal on appeal of a judgment of conviction, the court of appeals erred in reversing in the absence of a demonstration that respondents were substantially prejudiced by the violation. It is a general rule that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been

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[12] We do not recommend that the Court hold this petition in light of *Vasquez*. We believe the special substantive context—racial discrimination—and the procedural context—habeas corpus review of a state court conviction rendered almost 23 years ago—make it unlikely that a decision in *Vasquez* will directly control the disposition of this case. However, we believe that this case, in tandem with *Vasquez*, would provide the Court an opportunity to reaffirm the basic principles of review of grand jury proceedings, and to clarify the circumstances in which those principles are "outweighed" by other fundamental concerns. *Rose* v. *Mitchell*, 443 U.S. at 558.

deliberate." *United States* v. *Morrison*, 449 U.S. at 365. Cf. *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984) (to prevail on a claim of ineffective assistance of counsel, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different); *United States* v. *Lovasco*, 431 U.S. 783 (1977) (proof of actual prejudice required before a court will consider a due process claim arising from pre-indictment delay); *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978) (proof of actual prejudice an important element of claim of post-indictment delay under Speedy Trial Clause); *Barker* v. *Wingo*, 407 U.S. 514 (1972) (same); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (showing of prejudice required where the government deported witnesses before they could testify for the defendant).

As the decision below attests, these principles have been unevenly applied by the courts of appeals in the Rule 6(d) context. Most courts that have reviewed convictions in cases involving the presence of unauthorized persons before the grand jury have held that, absent demonstrable prejudice, dismissal of an indictment is an inappropriate sanction for a violation of Rule 6(d).[13] *See, e.g. United States* v. *Condo*, 741 F.2d 238 (9th Cir. 1984), cert. denied, No. 84-5793 (Jan. 14, 1985); *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122 (9th Cir. 1982); *United*

[13] Many district courts have dismissed indictments prior to trial because of Rule 6(d) violations which had little or no prejudicial impact. See cases cited App., *infra*, 44a; 1 C. Wright, *Federal Practice and Procedure* § 105 (1982). Such dismissals have generally not been appealed because it is simpler and more expeditious to reindict the defendant.

States v. *Kazonis*, 391 F. Supp. 804, 805 (D. Mass. 1975), aff'd mem., 530 F.2d 962 (1st Cir.), cert. denied, 429 U.S. 826 (1976); *United States* v. *Rath*, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969).[14] But see *Latham* v. *United States*, 226 F. 420 (5th Cir. 1915) (alternative holding); *United States* v. *Echols*, 542 F.2d 948, 951 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977) (dictum). This conflict in the circuits should be resolved.[15]

[14] An earlier panel of the Fourth Circuit, in *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (1982), declined to dismiss an indictment automatically when presented with violations of Fed. R. Crim. P. 6(d). Stating that "each situation should be addressed on a *sui generis* basis," the court found that the "invasions of the grand jury proceedings were rare, inadvertent and nonprejudicial to any defendant" (689 F.2d at 1184-1185). The court concluded that "[i]t is simply inappropriate to nullify grand jury work * * * because of technical, trivial, harmless violations of no significant duration of Fed.R.Crim.P. 6(d)" (*id.* at 1186). This ruling was made, moreover, in the context of a pretrial challenge to an indictment, where the costs associated with dismissal are far less. While purporting to distinguish *Computer Sciences* (App., *infra*, 19a-20a), the court below has in fact overruled it. See App., *infra*, 12a (Wilkinson, J., dissenting).

[15] The analysis of the court of appeals is itself internally inconsistent. If, as the court purported to hold, a Rule 6(d) violation must be remedied by reversal of the conviction and dismissal of the indictment wholly without regard to whether the defendants were prejudiced thereby, the court should not have affirmed the convictions of respondents Mechanik and Lill on the substantive counts. See App., *infra*, 2a (Widener, J. and Phillips, J., dissenting in part). To be sure, there is no possibility that Lill or Mechanik was affected by the Rule 6(d) violation as to these counts, since the counts had appeared in identical form in the original indictment; however, according to the court of appeals, that should be deemed irrelevant. App., *infra*, 18a-19a.

The conflict in the circuits is even more pronounced when the decision below is compared to decisions involving other forms of prosecutorial misconduct or mistake before the grand jury. There is no reason to apply a more exacting standard to violations of explicit rules of criminal procedure than to other instances of prosecutorial misconduct; indeed, the latter frequently pose a more substantial threat to the independence and integrity of the grand jury. Yet when considering other such violations, the courts of appeals have generally reached conclusions conflicting with that reached below. In *United States* v. *Birdman*, 602 F.2d 547, 559 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980), for example, the Third Circuit refused to impose the "extreme sanction" of dismissal of the indictment where the prosecutor appeared also as a witness before the grand jury, because the misconduct did not prejudice the defendant. Pointing out that other remedies would be "more appropriate" than "a windfall dismissal for unharmed parties" (*id.* at 561), the court of appeals acknowledged that "to attempt to serve a public interest in the purity of the grand jury proceeding, by the per se sanction of dismissing indictments, is to disserve another public interest by frustrating prosecutions of criminals" (602 F.2d at 559).

Similarly, other courts of appeals have held that dismissal of an indictment for other types of prosecutorial misconduct before the grand jury is appropriate only where clear prejudice to the defendant is demonstrated. The remedy of dismissal is generally reserved for "flagrant cases," in which the defendant is able to show "that the prosecutor's conduct significantly infringed upon the ability of the grand jury to exercise its independent judgment." *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386, 1391-

1392 (9th Cir. 1983), cert. denied, No. 83-1127 (Mar. 5, 1984); *United States* v. *Cederquist*, 641 F.2d 1347, 1352-1353 (9th Cir. 1981). "The relevant inquiry * * * focuses not on the degree of culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality." *Sears, Roebuck & Co.*, 719 F.2d at 1392. See also, *e.g.*, *United States* v. *Adamo*, 742 F.2d at 940; *United States* v. *Romano*, *supra*; *United States* v. *Al Mudarris*, 695 F.2d 1182, 1186 (9th Cir. 1983), cert. denied, 461 U.S. 932 (1983); *United States* v. *Heffington*, 682 F.2d 1075 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Broward*, 594 F.2d 345 (2d Cir. 1979), cert. denied, 442 U.S. 941 (1979). But see *United States* v. *Serubo*, 604 F.2d 807, 817-818 (3d Cir. 1979); *United States* v. *Pabian*, 704 F.2d 1533, 1540 (11th Cir. 1983) (leaving necessity for showing prejudice unresolved).

Even assuming the burden is not on the defendants to make a showing of demonstrable prejudice, the government should still prevail if it can show that the Rule 6(d) violation was harmless. See *Kotteakos* v. *United States*, 328 U.S. 750 (1946). Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error * * * which does not affect substantial rights shall be disregarded". In *United States* v. *Hasting*, 461 U.S. at 509, this Court made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations". See also *Chapman* v. *California*, 386 U.S. 18 (1967). Otherwise, appellate courts become "impregnable citadels of technicality," automatically reversing convictions based on nothing more than harmless errors. *United States* v. *Hasting*,

461 U.S. at 509, quoting R. Traynor, *The Riddle of Harmless Error* 14 (1970).

The decision below is in clear violation of the requirement that any adjudication of error be accompanied by a harmless error analysis.[16] If a non-prejudicial constitutional error does not require reversal (*United States* v. *Hasting*, 461 U.S. at 509), it follows that a violation of a Rule of Criminal Procedure, which is not of constitutional magnitude, likewise does not. As Judge Wilkinson commented in dissent below, "[h]ow Rule 6(d) should somehow attain a status the Supreme Court has refused to accord non-prejudicial departures from most constitutional norms is inexplicable" (App., *infra*, 9a).

The court of appeals' justification for dispensing with a showing of prejudice in the Rule 6(d) context does not withstand analysis. The court suggested, first, that "Rule 6(d) is plain and unequivocal in limiting who may appear before a grand jury" (App., *infra*, 19a). This, however, is beside the point. The ease with which the Rule may be understood may have a bearing on the prosecutor's culpability in violating it; but has little relevance to whether the error has "affect[ed] substantial rights" of the defendant (Fed. R. Crim. P. 52(a)). See *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 n.14. The court of appeals suggested, second, that "[r]equiring a defendant to show prejudice would impose a difficult burden that could undermine the protection that the rule provides" (App., *infra*, 19a). However, we can-

[16] The decision below also violates 28 U.S.C. 2111, which provides that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

not see why the consequences of a Rule 6(d) violation would be any more difficult to trace than the consequences of other prosecutorial mistakes and misdeeds that have been subjected to such an analysis. See, *e.g.*, *United States* v. *Valenzuela-Bernal*, 458 U.S. at 871 (while defendant "may face a difficult task in making a showing of materiality, the task is not an impossible one"); *Weatherford* v. *Bursey*, 429 U.S. 545, 556-557 (1977) ("Nor do we believe that * * * the difficulties of proof will be so great that we must always assume * * * that [the government's violation] has the potential for detriment to the defendant."). Indeed, the district court's opinion demonstrates that the potential prejudice from a Rule 6(d) violation can be analyzed conscientiously and reliably. If the court of appeals' analysis were adopted, there would be little left of the principle that only errors that have a substantial effect on the outcome of the prosecution are cognizable on appeal.

Had the court of appeals inquired whether respondents were prejudiced by the joint appearance of Agents James and Rinehart, it would surely have upheld the convictions. The district court, upon painstaking analysis of the grand jury record, found that the possibility of actual prejudice was "utterly remote" (App., *infra*, 51a). The court of appeals did not hold this finding clearly erroneous, and the finding is amply supported by the record.

The error in allowing Agents Rinehart and James to testify together is only tenuously related to the purposes of Fed. R. Crim. P. 6(d): preserving the secrecy of the grand jury proceedings and avoiding the intimidation of witnesses or grand jurors on account of the presence of unauthorized persons in the

grand jury room. App., *infra*, 38a, 40a; see *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 5; *United States* v. *Kazonis*, 391 F. Supp. at 805; *United States* v. *Bowdach*, 324 F. Supp. 123, 124 (S.D. Fla. 1971). The secrecy of the grand jury was not realistically threatened since both agents already had full access to grand jury materials.[17] The prospect that the joint testimony might have created a risk of intimidating the grand jurors likewise was remote.[18]

Moreover, since the joint testimony affected only a *superseding* indictment—which was merely a modification of an earlier, untainted indictment—it is especially clear that the "ability of the grand jury to exercise its independent judgment" was not "significantly infringed" (*United States* v. *Cederquist*, 641 F.2d at 1353). As the district court found in

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[17] Both agents had access to all grand jury materials in the case, as allowed by Rule 6(e)(3)(A)(ii). Thus, no disclosure either made to the other during their joint testimony could possibly have revealed information not otherwise known or properly disclosable. While the obligation of secrecy embodied in Rule 6(e) under normal circumstances is not imposed on a witness, the agents were bound by the strictures of Rule 6(e)(2) not to make unauthorized disclosures of any grand jury information to which they were privy. Thus, it is inconceivable that a breach of secrecy could have been caused by their joint testimony, and it has never been suggested that there was any.

[18] Nor was there any serious risk that the unauthorized presence of each agent improperly influenced the testimony of the other. Both agents had testified before the same grand jury in support of an earlier indictment, which was not materially different from the indictment upon which they testified jointly. The grand jurors had ample opportunity to weigh the credibility of each witness prior to the joint appearance.

meticulous detail, every relevant alteration or addition in the superseding indictment was supported by "ample independent evidence" before the grand jury apart from the agents' joint testimony (App., *infra*, 51a). It follows, as the district court also found (*ibid.*), that "the grand jury would * * * undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately."

In sum, the court of appeals has reversed convictions reached after a complicated, lengthy, and costly trial solely because of a procedural irregularity in the grand jury proceeding that could have had no effect on the outcome of the grand jury proceeding, let alone the trial. If allowed to stand, the decision will multiply opportunities for criminal defendants to obtain reversals of otherwise valid convictions and to draw the district and appellate courts into needless and time-consuming controversies over grand jury procedures.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5166

UNITED STATES OF AMERICA, APPELLEE

v.

MARSHALL MECHANIK,
a/k/a MICHAEL PATRICK FLANAGAN, APPELLANT

No. 80-5167

UNITED STATES OF AMERICA, APPELLEE

v.

SHAHBAZ SHANE ZARINTASH, APPELLANT

No. 80-5168

UNITED STATES OF AMERICA, APPELLEE

v.

JEROME OTTO LILL,
STEVEN HENRY RIDDLE, APPELLANTS

No. 80-5169

UNITED STATES OF AMERICA, APPELLEE

v.

MARK DOUGLAS CHADWICK, APPELLANT

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, District Judge. (CR 79-20056-11; 79-20045-07; 79-20056-09; 79-20045-06; 79-20056; 79-20045; 79-20056-04; 79-20045-05)

Argued: December 5, 1984 Decided: March 1, 1985

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON and SNEEDEN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PER CURIAM:

I

For reasons stated in the majority opinion of the panel, United States v. Mechanik, 735 F.2d 136 (4th Cir. 1984), the judgments convicting Mechanik, Zarintash, Lill, and Riddle on count 1 of the indictment are reversed.

Dissenting, Judge Russell, Judge Hall, Judge Chapman, Judge Wilkinson, and Judge Sneeden would affirm for the reasons stated in the dissent to the panel opinion, 735 F.2d at 141.

II

The judgments convicting Mechanik on count 10 and Lill on counts 2 and 4 are affirmed for reasons stated in the panel opinion.

Judge Widener and Judge Phillips dissent. They would dismiss these counts of the indictment for the same reasons that count 1 is dismissed.

III

The jury was unable to reach a verdict with respect to Chadwick, and the district court declared a mistrial. He appealed assigning several errors, including the denial of the motion to dismiss the indictment and the denial of his motion for a judgment of acquittal on the ground of insufficient evidence. He claims that retrial will subject him to double jeopardy. The panel dismissed his appeal for lack of jurisdiction, citing United States v. Ellis, 646 F.2d 132 (4th Cir. 1981).

After the panel opinion was filed, the Supreme Court decided Richardson v. United States, 104 S. Ct. 3081 (1984). The Court held that after a mistrial was declared because of a hung jury, the defendant's contention that retrial would subject him to double jeopardy because evidence sufficient to convict had not been presented raised a colorable claim of double jeopardy appealable under 28 U.S.C. § 1291.* The Court held, however, that no valid claim of double jeopardy had been asserted because the declaration of a mistrial following a hung jury does not terminate the original jeopardy. The Court also said, 104 S. Ct. at 3086 n.6:

> It follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer "colorable" double jeopardy claims which may be appealed before final judgment. A colorable claim, or course, presupposes that there is some possible validity to a claim. . . . Since no set of facts will support the assertion

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* The Court noted that United States v. Ellis, 646 F.2d 132, 135 (4th Cir. 1981), reached a contrary conclusion. *See* 104 S. Ct. at 3083 n.4.

of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial, and there is little need to interpose the delay of appellate review before a second trial can begin.

The order denying Chadwick's motion for a judgment of acquittal and subjecting him to retrial did not terminate the original jeopardy to which he was subjected. Accordingly, as *Richardson* explains in note 6, he now has no colorable claim of double jeopardy which may be appealed before final judgment. His appeal is dismissed.

No. 80-5166 (Mechanik):
Count 1 reversed; count 10 affirmed.

No. 80-5167 (Zarintash):
Count 1 reversed.

No. 80-5168 (Lill):
Count 1 reversed; counts 2 and 4 affirmed.

No. 80-5168 (Riddle):
Count 1 reversed.

No. 80-5169 (Chadwick):
Dismissed.

WILKINSON, Circuit Judge, with whom Judge Russell, Judge Hall, Judge Chapman, and Judge Sneeden join, concurring in part and dissenting in part:

I dissent from the judgment of the court insofar as it invokes "a per se rule of invalidity" to reverse the convictions and dismiss the conspiracy count in the superseding indictment. *United States v. Mechanik*, 735 F.2d 136, 140 (4th Cir. 1984). The creation of this extraordinary remedy is not authorized by Fed.R.Crim.P. 6(d), not justified by statute or Constitution, and not consistent with the precedent of this court. Without cause or compensation, the public will now pay the price, and convicted criminal defendants will now reap the windfall benefit, of a prosecutorial mistake. This result is not right in a system of criminal justice which has become enormously complex and in which even seasoned judges and attorneys are not immune from error. Here the district court found neither bad faith on the part of the government nor prejudice to the rights of defendants. It denied the motion of defendants to dismiss the indictment because of the violation of Rule 6(d). *United States v. Lill*, 511 F.Supp. 50 (S.D. W.Va. 1980). Because I believe that the district court properly addressed and properly resolved the issue, I would affirm the convictions on all counts.

I

No one disputes that the government violated Rule 6(d) by offering the joint testimony of Agents James and Rinehart. The question is how the district court should have responded to that prosecutorial error. In confronting this problem, the first point of reference must be the rule itself:

> *Who May Be Present*: Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

As the court observes, the language is "plain and unequivocal in limiting who may appear before a grand jury." 735 F.2d at 139. Clarity of prohibition, however, does not imply a rule of reversal for any and all violations. Fed.R.Crim.P. 7(c), for example, is equally plain and unequivocal in requiring the indictment to refer specifically to statutes or regulations that the defendant is said to have infringed, but errors in the citations, or complete omission of the citations, will not support dismissal of an indictment unless the error has misled the defendant to his or her prejudice. *See* Fed.R.Crim.P. 7(c)(3). More generally, almost any proscription of prosecutorial conduct may be cast in unambigous terms. The appropriate remedy for a particular form of misconduct is determined not by the directness of expression but by the context, the purpose, and the practical workings of the standard involved.

The immediate context of Rule 6(d) is the conception of justice envisioned by the Federal Rules of Criminal Procedure. The rules operate as an efficient means to truth and a partial guarantee of integrity, without any pretension of being, in every detail, a necessary ritual of fairness. The rules are not an end in themselves. The rules live for, and through, the judgment. They deter noncompliance by requiring reversal where departure from the rules

has affected the judgment—a threat completely adequate to ensure the obedience of the participants in the trial process. Some judicial values may be compromised by an error which has not affected the judgment, but if truth and integrity are respected, acceptance of the result offsets such a compromise by advancing nobler values of decision: the innocent are freed, the guilty are named, the commitment of resources to litigation is husbanded.

Fed.R.Crim.P. 52(a) embodies this principle, stating broadly:

> *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Binding on this court under Rule 54(a), the plain and unequivocal language of Rule 52(a) requires us to review indictments tainted by rules violations, including Rule 6(d) violations, with attention to the likeli[illegible]od that the defendant has been disadvantaged by the procedural failure. *See generally United States v. Dougherty*, 473 F.2d 1113, 1127-28 (D.C. Cir. 1972). Adoption of a per se rule of invalidity, which allows for no such Rule 52(a) analysis, overlooks the axiom of interpretation that the rules should be read together as an integrated, harmonious whole. Ironically, the result is that a construction intended to compel adherence to the federal rules, 735 F.2d at 139, is in itself unfaithful to the restriction of enforceability, and the conception of justice, recognized by the rules themselves.

The same conclusion is compelled by related acts of Congress and decisions of the Supreme Court. The salient statute, 28 U.S.C. § 2111, provides that

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Originally enacted to prevent appellate courts from looming above criminal trials as "impregnable citadels of technicality," *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (citation omitted), 28 U.S.C. § 2111 echoes Fed.R.Crim.P. 52(a) in its insistence that "substantial rights" must be implicated before a conviction may be reversed. Again, that such substantial rights have been affected is determined not merely by asking whether a guarantee has been violated but by asking "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos*, 328 U.S. at 764. Toward the same end, an important line of Supreme Court cases beginning with *Chapman v. California*, 386 U.S. 18 (1967), establishes that even some constitutional norms are not so independently senstive that intrusion must always compel reversal of the subsequent judgment. In reviewing these intrusions, the appellate court will determine whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 24 *quoting Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Together the statute and the decisions refute a policy of per se dismissal based solely upon the promise and the purpose of Rule 6(d). To be sure, the rule does reflect considerations of justice in ensuring grand jury privacy and in preventing undue influence. But Fed.R.Crim.P 6(d) is no more central to due process, and no more demands acknowledg-

ment through automatic reversal, than many protections that have been subjected to harmless error analysis. *See, e.g., Chapman* (Fifth Amendment right to prosecutorial silence about defendant's failure to testify); *Coleman v. Alabama*, 399 U.S. 1, 11 (1970) (Sixth Amendment right to counsel at preliminary examination); *Chambers v. Maroney*, 399 U.S. 42, 53 (1970) (Fourth Amendment right to suppression of unlawfully seized evidence). Like these guarantees, and like the majority of procedural provisions, Rule 6(d) must be addressed in any remedial analysis through its influence on the judgment. How Rule 6(d) should somehow attain a status the Supreme Court has refused to accord non-prejudicial departures from most constitutional norms is inexplicable.

Nor is a per se response to Rule 6(d) violations suggested by the additional due process limitation of the harmless error principle to defects and consequences that are susceptible to evaluation. As Justice Harlan noted in *Chapman v. California*, the effect of some procedural errors is "so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." 318 U.S. at 52 n. 7 (Harlan, J., dissenting). This rationale explains automatic reversal for errors that suffuse the proceeding, distorting the very perspective of the fact-finder, and by extension, the perspective of the reviewing court. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of assistance of counsel at trial). In contrast, the error at issue here involved one isolated session of prosecutorial testimony. By extracting that evidence and examining the remainder of the record, a court may determine the probability that the testimony influenced the grand jury with

no more uncertainty than is inevitable in routine applications of harmless error.[1]

Alluding to the "difficult burden" upon a defendant required to show the prejudicial effect of a Rule 6(d) violation, the court appears to refine the above argument and to suggest that the effect of an error is decisively less apparent to the accused. 735 F.2d at 139. Under this theory, the limited availability of grand jury information so constricts the dependant's capacity to assess the violation as to mandate dismissal of tainted indictments. But a per se rule does nothing to lighten the truly difficult burden on the defendant—the detection of all Rule 6(d) violations.[2] The per se remedy instead addresses the burden of showing *prejudice*, a problem for which 18 U.S.C. § 3500, Fed.R.Crim.P. 6(e)(3), Rule 16(a)(1)(A), and Rule 26.2 already equip the knowing victim. Furthermore, dismissal of the indictment is too drastic a solution to this perceived disadvantage. As the district court intimated here, the complications of defendant's position can be alleviated by placing responsibility on the prosecution to demonstrate to the court the absence of prejudice, a result further suggested by the duty of the government to prevent Rule 6(d) violations. *See also Chapman v. California*, 386 U.S. at 24.

[1] Obviously, another case might involve a Rule 6(d) violation more difficult to trace, just as another case might involve a Rule 6(d) violation that had prejudiced a defendant. The range of possibilities only emphasizes that each situation must be examined in its own context rather than on a per se basis.

[2] The district court would handle the problem of detection through its command that "in order to assure that the one-witness rule is observed in subsequent grand jury proceedings, the prosecutor will henceforth be directed routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled." *United States v. Lill*, 511 F.Supp. at 61.

II

Neither Rule 6(d) nor the limitations upon the harmless error principle will support a per se rule of invalidity for indictments obtained after unauthorized parties have appeared before the grand jury. The proper response is "to identify and then neutralize the taint by tailoring relief appropriate in the circumstances." *United States v. Morrison*, 449 U.S. 361, 365 (1981). Indeed, the last time that this court reviewed an indictment on Rule 6(d) grounds, it followed precisely that approach. *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982). Noting that "each situation should be addressed on a *sui generis* basis," the court examined the nature of the violations, the length of the proceedings, the culpability of the government, and the likelihood that the defendants had suffered any prejudice through the error. *Id.* at 1184-85. Concluding that the violations had been isolated, that grand jury secrecy had been maintained, that the proceedings had been extensive, that the government had merely been negligent, and that the defendants had suffered no injury, the court declined to dismiss the contested counts of the indictment. *Id.*[3]

[3] Its invocation of a per se rule of invalidity notwithstanding, the plurality opinion attempts to adopt a measure of this *sui generis* approach in its disposition of the other counts of the indictment. Noting that "this case, involving a superseding indictment, presents a unique situation," the court affirms the convictions on the substantive counts because "there was a valid basis for the charges they set forth that was independent of the unauthorized joint appearance of the

The district court followed precisely the same approach here, anticipating *United States v. Computer Sciences Corp.* in every respect. It found that only one violation had occurred, that it had not compromised privacy interests, and that it had taken place after the grand jury had returned much of the final indictment. The court noted that the trial pursuant to the indictment had consumed three months, at enormous expense to the government and the defendants, and had reached a conclusion that was in itself unchallenged. The court had already observed, in an earlier memorandum opinion, that the government conduct revealed no evidence of bad faith and no intent to confuse or mislead the grand jury. Finally, the court conducted a comprehensive inquiry into the likelihood of prejudice and determined that any improper influence was possible only "in the sense that all things are possible." *Id.* at 61. This path of reasoning parallels that of *United States v. Computer Sciences Corp.* so closely that its rejection—in favor of a per se rule of invalidity—can only be interpreted as overruling a very recent precedent. *See United States v. Mechanik*, 735 F.2d 136, 141-42 (Hall, J., dissenting).

Distinctions between the underlying circumstances of *United States v. Computer Sciences Corp.* and the facts presented by this case do nothing to reconcile the contradiction; the method of analysis is the crucial area of conflict. Moreover, I see no reason to

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agents." 739 F.2d at 140. This rationale, which echoes the basis of the unchallenged district court conclusion about the conspiracy count, cannot be reconciled with a per se rule. Recognizing the inconsistency, two judges concurring in the dismissal of the conspiracy count have also voted to dismiss the entire indictment.

disagree with the conclusion of the district court on this record. The comparison of testimony and the history of this particular grand jury fully support the determination that the defendants suffered no prejudice through the joint appearance of the agents. The other factors were properly weighed, and the relief granted by the court was appropriate to the situation. The wisdom of the decision below, no less than the import of authority above, and a respect for recent precedent within this court, dictates affirmance of these convictions.

III

Perhaps no aspect of this court's responsibility is more delicate than the review of criminal convictions challenged because of acknowledged procedural errors. We must identify the many changing faces of substantial right and mere technicality. We must be mindful of the complicity of the judicial system in the improper conduct. And, without meeting the jury or hearing its deliberations, we must imagine why a group of men and women chose to believe as they did. The awareness of our own limitations and the consequences of our mistakes understandably tempt us to withdraw into a sanctuary of procedure, to require every judgment to honor the rituals of rules as well as the essence of fairness. But our duty precludes that retreat. We must at least attempt to determine whether an imperfect justice remains nonetheless an act of justice. Because the decision of the court forsakes that attempt, I must, with respect, dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 80-5166 to 80-5169

UNITED STATES OF AMERICA, APPELLEE

v.

MARSHALL MECHANIK,
a/k/a MICHAEL PATRICK FLANAGAN, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

v.

SHAHBAZ SHANE ZARINTASH, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

v.

JEROME OTTO LILL,
STEVEN HENRY RIDDLE, APPELLANTS

UNITED STATES OF AMERICA, APPELLEE

v.

MARK DOUGLAS CHADWICK, APPELLANT

Argued Feb. 9, 1984

Decided May 16, 1984

Before WINTER, Chief Judge, HALL, Circuit Judge, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

Steven H. Riddle, Shahbaz S. Zarintash, Jerome O. Lill, and Marshall Mechanik, convicted of drug related offenses, assign as principal error the district court's denial of their motion to dismiss the indictment because the prosecutor violated Federal Rule of Criminal Procedure 6(d).[1] Mark D. Chadwick, charged with conspiracy, appeals the district court's denial of a judgment of acquittal after the jury was unable to reach a verdict.

Because two witnesses testified simultaneously before the grand jury in violation of rule 6(d), we conclude that count 1, charging conspiracy, should have been dismissed. Counts 2, 4, and 10, charging substantive offenses, were not tainted by this impropriety and need not be dismissed.[2] We find no cause for reversal in the other assignments of error.

I

This prosecution arose out of the crash of an aircraft carrying approximately 10 tons of marijuana

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[1] Riddle and Zarintash were convicted of conspiring to commit offenses involving marijuana (count 1). Lill was convicted of conspiracy (count 1), importing marijuana (count 2), and possession with intent to distribute marijuana (count 4). Mechanik was convicted of conspiracy (count 1) and traveling in interstate commerce to carry on an illegal business enterprise (count 10).

[2] The district court's opinion, *United States v. Lill*, 511 F.Supp. 50 (S.D. W.Va. 1980), recounts in meticulous detail all proceedings pertinent to the issue involving rule 6(d), making it unnecessary for us to advert to much of the record.

at an airport near Charleston, West Virginia. The same grand jury returned two indictments.[3] The first was returned a week after the plane crashed. There was no irregularity in the grand jury proceedings that led to the return of this indictment.

The investigation continued, and drug enforcement agents gathered additional evidence. For this reason, the prosecutor drew a superseding indictment for consideration by the grand jury. In support of the superseding indictment, the prosecutor presented two agents who were sworn and questioned together. The transcript discloses that they alternated in their testimony, occasionally supplementing each other's answers. Each was not simply a passive auditor of the other's examination. The appellants were tried on the superseding indictment.[4]

The principal difference between the indictments with respect to the appellants was count 1 charging conspiracy. The superseding indictment alleged the commission of additional overt acts by the appellants. These additional allegations were the subject of the agents' joint testimony. Counts 2, 4, and 10 were

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[3] The district court found, 511 F.Supp. at 58-59:

> It is especially significant to note that the two indictments were returned by the same grand jury. The court's review of the attendance and voting records of that grand jury reveals that each of these indictments was returned by a unanimous vote. A nucleus of the same seventeen grand jurors voted for each indictment. In addition, one other grand juror voted for the first indictment but did not vote on the second, while two others voted for the second indictment but did not vote on the first.

[4] Other persons were also named as defendants. Some pled guilty, some were acquitted, and one is a fugitive.

identical to their counterparts in the original indictments except for immaterial changes and numbering.

Unsuccessful in obtaining grand jury transcripts before trial, the appellants were unaware of the agents' joint appearance until one of them testified at the trial. Then, pursuant to 18 U.S.C. § 3500 (Jencks Act), the prosecutor furnished a partial transcript that disclosed this incident. The district court initially denied a motion to dismiss the indictment, but later, on resubmission, it took the motion under advisement and proceeded with the trial.[5]

After the jury returned its verdict, the district court denied the motion to dismiss. It ruled that the joint appearance of the agents violated rule 6(d). It concluded, however, that the appellants had failed to show prejudice primarily because other testimony corroborated the overt acts added to the superseding indictment.

II

Rule 6(d) provides that only "[a]ttorneys for the government, the witness under examination, interpreters . . . and . . . a stenographer or operator of a recording device may be present while the grand jury is in session . . . ." The rule is designed, in part, to insure that grand jurors, sitting without the direct supervision of a judge, are not subject to undue influence that may come with the presence of an unauthorized person. *See United States v. Echols*, 542 F.2d 948, 951 (5th Cir. 1976); *United States v.*

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[5] Judge Knapp initially denied the motion. After he became ill, Judge Copenhaver presided pursuant to Fed. R. Crim. P. 25(a).

Kazonis, 391 F.Supp. 804, 805 (D.Mass 1975), *aff'd without opinion*, 530 F.2d 962 (1st Cir. 1976).[6]

There is no doubt that, as the district court found, the simultaneous testimony of two agents constituted a violation of rule 6(d). The rule refers to "the witness" in the singular, in contrast to "[a]ttorneys for the government." This language was deliberate and consistent with traditional practice. *United States v. Carper*, 116 F.Supp. 817, 819-20 (D.D.C. 1953). Indeed, courts consistently have held that the presence of one witness during the testimony of another witness at grand jury proceedings taints an indictment. *See, e.g., United States v. Treadway*, 445 F.Supp. 959, 962 (D.D.Tex. 1978); *United States v. Bowdach*, 324 F.Supp. 123, 124 (S.D.Fla. 1971); *United States v. Edgerton*, 80 F. 374, 375 (D.Mont. 1897). The government cites no case to the contrary. Consequently, each agent was an unauthorized person at the grand jury sessions any time the other agent was testifying.

We reject the argument that defendants must show that a rule 6(d) violation prejudiced them before an

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[6] In *Kazonis*, 391 F.Supp. at 805, the court succinctly stated the controlling precept and its reasons:

> It is an accepted principle of the criminal law that the presence of an "unauthorized person" before a grand jury voids an indictment. This is not a mindless incantation, however, and relates to two extremely pragmatic considerations:
>
> (1) that the proceedings be private,
>
> (2) that witnesses and grand jurors sitting without the protection of a presiding justice be free from the risk of intimidation attendant upon the presence of numbers of prosecution witnesses, particularly police witnesses, in the grand jury.

indictment may be dismissed. Rule 6(d) is plain and unequivocal in limiting who may appear before a grand jury. Requiring a defendant to show prejudice would impose a difficult burden that could undermine the protection that the rule provides. *Carper*, 116 F. Supp. at 820. Indeed, most federal courts considering the matter have agreed that a showing of prejudice is not necessary to dismiss an indictment because of a rule 6(d) violation. *See, e.g., Echols*, 542 F.2d at 951; *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610, 618 (N.D.Okl. 1977); *United States v. Borys*, 169 F.Supp. 366, 367-68 (D. Alaska 1959).

Our decision in *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), does not depart from this line of cases. *Computer Sciences* reversed the district court's dismissal of an indictment by a grand jury that was interrupted five times. Each intrusion lasted no more than a minute or two and brought the proceedings to an abrupt halt. We held that such "technical, trivial, harmless violations of no significant duration" did not nullify the jury's work.[7] Other courts also have held that dismissal is

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[7] Nevertheless, we added, 689 F.2d at 1186:

> We should not be understood as commending the practice here. With the exception of the maintenance man, all of the intruders were apparently under the control of the prosecutors, who were obviously not diligent in keeping the sanctity of the grand jury room inviolate. Prosecutors should not consider what we have written as in any way amounting to an encouragement to depart from scrupulous compliance with Fed. R. Crim. P. 6(d). Having been fortunate enough to survive the attack here by the skin of their teeth on the basis of the record as a whole, they cannot count with any assurance on a similar conclusion on another record involving unauthorized grand jury room intrusions.

not warranted when the grand jury proceedings were halted during brief, inadvertent intrusions of unauthorized persons. *See United States v. Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982) (citing *Computer Sciences*); *United States v. Rath*, 406 F.2d 757, 757 (6th Cir. 1969).

In this case, by contrast, the proceedings continued in the presence of an unauthorized person. The agents, alternating their testimony before the grand jury, referred to themselves as the collective "we," backed up each other in the description of incriminating evidence, and supplemented each other's presentation. This joint effort could have added to each agent's credibility and could have had an undue influence on the grand jurors' decision to return the superseding indictment, especially where both witnesses were government officials. *See United States v. Daneals*, 370 F.Supp. 1289, 1296 (W.D.N.Y. 1974); *Bowdach*, 324 F.Supp. at 124.

In sum, we conclude that the joint appearance of the agents was a violation of rule 6(d). Because the proceedings were not halted when both were in the grand jury room, the indictment is invalid. "No showing of prejudice is required to quash an indictment secured with the presence of unauthorized persons in the grand jury room." *Echols*, 542 F.2d at 951.

III

This case, involving a superseding indictment, presents a unique situation. Counts 2, 4, and 10 were returned in the initial indictment under different numbers by the same grand jury after proceedings that were properly conducted. The superseding indictment simply incorporated these counts in virtually the identical form in which they appeared in the

initial indictment. Unlike the conspiracy count, there was a valid basis for the charges they set forth that was independent of the unauthorized joint appearance of the agents. Consequently, the invocation of a per se rule of invalidity is inappropriate for counts 2, 4, and 10.

Probable cause was found for the offenses charged in counts 2, 4, and 10 by the grand jury when it returned the initial indictment, which was not tainted by a violation of rule 6(d). Incorporation of these counts in the superseding indictment did not make them any less valid. Consequently, we conclude that the district court did not err by refusing to dismiss these counts.

IV

Three other assignments of error require but brief comment. The district court did not err by admitting into evidence a ground-to-air radio that the police seized from the cab of a truck they were chasing. The police had probable cause to stop the truck and arrest its driver for several violations of traffic laws. Probable cause to arrest authorized the police to search the passenger compartment. *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981). Formal arrest need not have preceded the search. *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980). Additionally, the search was permissible because the police had a reasonable belief based on specific facts that the occupants were dangerous. *Michigan v. Long*, —— U.S. ——, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

The district court properly admitted Chadwicks' postconspiracy statement to his sister and his sister's

grand jury testimony. The court properly instructed the jury that this evidence was admitted only against Chadwick. Because the statement did not specifically identify the other appellants, its admission did not violate the principles explained in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Cf. United States v. Seni*, 662 F.2d 277, 282 (4th Cir. 1981).

The district court's denial of Chadwick's motion for a judgment of acquittal is not an appealable order. *United States v. Ellis*, 646 F.2d 132 (4th Cir. 1981); *United States v. Carnes*, 618 F.2d 68 (9th Cir. 1980). Chadwick's reliance on the concurring opinion in *Ellis* is misplaced, for the evidence amply sufficed to warrant denial of the motion.

V

We find no merit in the appellants' other assignments of error. The conspiracy convictions of appellants Lill, Zarintash, Mechanik, and Riddle are reversed because of the violation of rule 6(d). On remand, the district court should dismiss count 1 of the superseding indictment. In all other respects, the judgment is affirmed.

No. 80-5166 (Mechanik): Count 1 reversed; count 10 affirmed.

No. 80-5167 (Zarintash): Count 1 reversed.

No. 80-5168 (Lill): Count 1 reversed; counts 2 and 4 affirmed.

No. 80-5168 (Riddle): Count 1 reversed.

No. 80-5169 (Chadwick): Appeal dismissed for lack of jurisdiction.

K.K. HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in all aspects of the majority's opinion except for its holding that the violation of Federal Rule of Criminal Procedure 6(d) was of such magnitude as to compel the dismissal of appellants' convictions for conspiracy. In my view, the majority has misconstrued the applicable law in evaluating this issue. Thus, because I would affirm the conspiracy convictions, I must dissent in part.

In *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983), this Court held that five brief intrusions by unauthorized persons during a grand jury investigation did not require dismissal of the indictment stemming from those proceedings. In reaching this conclusion, we emphasized that when evaluating alleged violations of Rule 6(d) "each situation should be addressed on a *sui generis* basis." *Id.* at 1185. Applying this rule to the facts of that case, we found that *Computer Sciences* was "a case '*absent demonstrable prejudice* or substantial threat thereof' so that 'dismissal of the indictment [was] inappropriate.'" *Ibid.* (quoting *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981)) (emphasis added).[1]

In a carefully reasoned opinion, the district judge in the instant case followed the guidelines enunciated in *Computer Sciences*. Judging the case on its own peculiar facts and merits, he found that although

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[1] The Court later reiterated this point by stating that "The case before us, in short, is one where there has been no . . . prejudice to the defendant." 689 F.2d at 1185.

a violation of Rule 6(d) had occurred when the government agents testified jointly before the grand jury, it had not been of such magnitude as to require dismissal of the indictments for conspiracy. Following this Court's lead in *Computer Sciences*, the district judge placed considerable emphasis on the question of whether appellants suffered demonstrable prejudice.[2]

Judge Copenhaver made a detailed analysis of the possible prejudicial impact of the Rule 6(d) violation on appellants' conspiracy indictments. It is true that appellants were tried on the superseding indictment and that several alterations and additions had been made in that indictment with respect to the conspiracy count. After carefully evaluating these changes, Judge Copenhaver found that each such alteration or addition was "either supported by testimony apart from the [agents] joint testimony or became moot by virtue of the acquittal of [codefendants] Kook and James Chadwick." [3] Pursuant to this analysis, he concluded that the possibility of prejudice existed only "in the sense that all things are possible," and that "the existence of actual prejudice is so utterly remote [as to] appropriately be disregarded." [4] Indeed, even on appeal appellants have been unable to advance any basis for a claim of prejudice.

The majority, citing case law from other circuits for the proposition that no showing of prejudice is required to quash an indictment in violation of Rule

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[2] The district judge also considered relevant case law, legislative history, and policy considerations in making his decision.

[3] *United States v. Lill*, 511 F.Supp. 50, 59 (S.D. W.Va. 1980).

[4] *Id.* at 61.

6(d),[5] reverses the district judge's decision on the conspiracy count without considering any of the aforementioned factual findings. In so doing, it has, in effect, tried to establish the very *per se* rule which this Court rejected in *Computer Sciences*. The majority has ignored the guidelines enunciated in *Computer Sciences* requiring the district judge to evaluate such cases "on a *sui generis* basis." In my view, the majority is bound by *Computer Sciences* and may not rely on the case law of other circuits to reverse appellants' convictions. Such a decision is particularly undesirable here, where the part of the superseding indictment found to be bad closely tracked the charging portion of the original indictment and in no way surprised or prejudiced the defendants.

For the foregoing reasons, I would affirm appellant's conspiracy convictions as well as their convictions on the substantive counts.

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[5] *See United States v. Echols*, 542 F.2d 948 (5th Cir. 1976); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okl. 1977); *United States v. Borys*, 169 F.Supp. 366 (D. Alaska 1959).

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. WEST VIRGINIA
CHARLESTON DIVISION

Crim. A. Nos. 79-20045, 79-20056

UNITED STATES OF AMERICA

v.

JEROME OTTO LILL, MARK DOUGLAS CHADWICK, SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, STEVEN HENRY RIDDLE

Aug. 15, 1980

MEMORANDUM ORDER

COPENHAVER, District Judge.

This matter is before the court on the defendants' motion to dismiss by virtue of a violation of Rule 6(d) of the Federal Rules of Criminal Procedure in that two government agents appeared simultaneously and testified interchangeably as witnesses before the grand jury returning the second of two indictments in this case. This issue was reserved from prior rulings by the court.

The procedural history of defendants' motion is as follows: The first of two indictments in this case was returned on June 14, 1979. In his omnibus motion filed on July 6, 1979, defendant Zarintash, asserting the possibility of a violation of Rule 6(d), sought a list of all persons appearing before the grand jury. All defendants thereafter filed motions adopting the

various pretrial motions filed by each defendant. A second or superceding indictment was returned on August 10, 1979. Defendants then moved to have all pre-trial motions made applicable to the August 10th indictment. By order entered January 4, 1980, Judge Dennis R. Knapp denied all pre-trial motions which had not been previously ruled upon. On several occasions prior to trial defendants unsuccessfully sought disclosure of the transcripts of the grand jury testimony in connection with various pre-trial motions.

Trial of seven of the twelve named defendants commenced under the superceding indictment on February 19, 1980. On February 28, 1980, defendants received a partial transcript of the grand jury testimony of Drug Enforcement Administration Agent Jerry Rinehart pursuant to 18 U.S.C. § 3500 which revealed that Agent Rinehart testified before the grand jury simultaneously with DEA Agent Randolph James just prior to the return of the superceding indictment. The defendants thereupon moved for dismissal of the indictment on the basis of a violation of Rule 6(d). By order entered on March 14, 1980, defendants' motion to dismiss and their alternative motion to stay the trial pending appeal was denied by Judge Knapp. While the trial continued, defendants filed a Notice of Appeal and petitioned Circuit Judges James M. Sprouse on March 19, 1980, for a stay pending appeal. The stay was denied by order entered on March 25, 1980. On April 10, 1980, a panel of the United States Court of Appeals for the Fourth Circuit, consisting of Circuit Judges Hall, Phillips and Sprouse, denied defendants' petition for a writ of mandamus and for a writ of prohibition.

Thereafter, Judge Knapp was unexpectedly hospitalized. On April 28, 1980, he directed that this

action be transferred to the docket of the undersigned judge. On May 22, 1980, defendants moved for rehearing of their motion to dismiss the indictment on the ground of unauthorized appearances before the grand jury. The court took that motion under advisement while the trial continued in progress.

When the trial concluded July 3, 1980, two of the seven defendants on trial were acquitted. Of the remaining five, named in the caption above, the jury was unable to reach a verdict as to Mark Chadwick. Jerome Lill was found guilty on counts one, two and four, Marshall Mechanik was found guilty on counts one and ten, Steven Riddle was found guilty on count one, and Shahbaz was found guilty on count one, and Shahbaz Zarintash was found guilty on count one.

I.

The event giving rise to the two indictments and subsequent jury trial in this criminal action was the crash landing of a DC-6 aircraft laden with some ten tons of marijuana at the Kanawha County Airport, Charleston, West Virginia, at 12:53 a.m., on June 6, 1979. On June 12, 1979, a federal grand jury convened to investigate the crash, and on June 14, 1980, after having heard approximately thirty witnesses, the first of two indictment was returned (No. 79-20045 CH).[1] The June 14th indictment consisted of one conspiracy count and seven substantive counts and named nine defendants.[2]

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[1] The June 14, 1980, indictment was omitted from publication at the suggestion of the court.

[2] The nine defendants are: Breck Dana Anderson, David Thomas Seesing, Jerome Otto Lill, Gregory Louis McCafferty, Mark Douglas Chadwick, Shahbaz Shane Zarintash, Marshall Mechanik, Leon Jacques Gast, and Steven Henry Riddle.

On July 31, August 2, 9 and 10, the same grand jury received further testimony regarding the June 6, 1979, DC-6 crash. On August 10, 1979, the grand jury returned a second, superceding indictment consisting of one conspiracy count and eleven substantive counts and adding three defendants (No. 79-20056).[3] The conspiracy count in the August 10th indictment was amended and expanded as set forth, *infra*, at 59-60.[4]

As noted, the trial of seven of the twelve defendants named in the August 10th indictment commenced on February 19, 1980.[5] On February 28, 1980, Agent Rinehart testified on behalf of the government, at which time the government furnished defendants with a portion of the transcript of Agent Rinehart's grand jury testimony as § 3500 material. The transcript disclosed that on August 10, 1979, Agent Rinehart was placed under oath simultaneously with fellow-DEA Agent James. The agents were sworn immediately prior to the reading of portions of the proposed superceding indictment to the grand jury by Assistant United States Attorney Hoffman. Questions were

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[3] The three additional defendants are: James F. Chadwick, Craig Bruce McGilvray, and Russell Kook.

[4] Pursuant to the court's rulings on the government's motion to dismiss filed at the conclusion of its case in chief and defendants' motions to strike and for judgment of acquittal filed at the close of the evidence, the August 10, 1979, indictment was significantly redacted. The August 10, 1979 and the redacted indictments were omitted from publication at the suggestion of the court.

[5] Defendants Anderson, Seesing, Gast and McCafferty entered pleas of guilty prior to the commencement of the trial. Defendant McGilvray has not been found and remains at large.

then propounded to Agents Rinehart and James by United States Attorney King, Assistant United States Attorneys Hoffman and DiPiero, and by the grand jurors.

More specifically, the agents' joint testimony commenced with Agent Rinehart who testified regarding changes made in the first eight paragraphs of the conspiracy count in the proposed superceding indictment. Agent James interjected once at the conclusion of this phase of the agents' joint testimony in response to a juror's question directed to Agent Rinehart regarding the flight experience of defendants (and pilots) Anderson and Seesing:

> JUROR: You don't know how many [flight] hours or anything like that?
>
> MR. RINEHART: No.
>
> MR. JAMES: The way you would determine their hours is from their last medical. I think David Seesing was the pilot who probably had the best credentials for flying. He had ratings in addition to what Anderson had.
>
> I believe his hours of flight time were quite a bit more than Anderson's. I would have to check the records on that to make sure.
>
> But I think his records outweighed Anderson's, or his credentials.
>
> MR. HOFFMAN: Agent Rinehart, is there anything else you would like to clear up before we go into the overt acts?
>
> MR. RINEHART: Okay.
>
> MR. HOFFMAN: Let's go through the overt acts beginning with paragraph 9. The overt acts will show how it was part of the conspiracy, the charges in paragraphs 1 through 8.

(Tr. 39).

Thereafter Agents Rinehart and James generally alternated their testimony with respect to each of the overt acts alleged in paragraph nine of the proposed superceding indictment. On several occasions, Assistant United States Attorney Hoffman interjected to refer the jurors to the substantive count in the indictment which corresponded to the testimony they were about to receive from Agent Rinehart or James regarding an overt act. The following excerpt is representative of the nature of the remainder of the Rinehart/James joint testimony:

> MR. HOFFMAN: I believe, Agent Rinehart, that an analysis of the telephone tolls of the Sanderson number in Daytona Beach reveals numerous calls by and between various of the defendants charged in the indictment, is that correct?
>
> MR. RINEHART: That's correct. We have calls from the Sanderson number, where Kook and Powers reside, to several of the defendants alleged in the indictment.
>
> MR. HOFFMAN: Go ahead with (c).
>
> MR. JAMES: "On or about the 20th day of April, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio."
>
> As you are aware, I traveled to Cleveland, interviewed people at the Ryder Truck Rental Company's district office on Brook Park Road in Cleveland, and, in reviewing their records for trucks rented to a George T. Markos, we determined that a George T. Markos had rented trucks, or a truck, a Ryder truck, from them on April 20, 1979.

There was a rental agreement in file reflecting the rental of a truck on that date. An employee of that company who rented the truck to Mr. Markos identified a photograph which was presented in what we call a photo spread, a series of photos, identified a photo of Gregory McCafferty as being the individual who had come in and rented the truck using the name George Markos.

MR. RINEHART: If you will notice from that overt act, then you will have a time period of April 23 through April 28 where there are several telephone calls made shortly after the rental of that truck.

Overt act (e) reads, "On or about the 23rd day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Daytona Beach, Florida."

MR. JAMES: There is a second rental of a truck in overt act (d) which I will cover before we get to the phone calls. . . .

(Tr. 44-46). The bulk of their testimony found Agent James relating information he had obtained respecting Ryder truck rentals and travel, as well as James Chadwick's alleged involvement, while Agent Rinehart undertook to weave this and other information into the network of telephone calls being summarized for the grand jury by Rinehart. The complete transcript of the grand jury proceedings at which Agents Rinehart and James were present jointly, apart from the reading of the indictment by the Assistant United States Attorney, is some sixty-two pages in length.

II.

Rule 6(d) of the Federal Rules of Criminal Procedure delineates who may be present before a federal grand jury:

> (d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Defendants, contending that the rule has consistently been strictly construed, insist that the presence of more than one witness before the grand jury at one time constitutes an appearance by an unauthorized person in violation of the rule. This, defendants claim, requires the dismissal of the indictment. The governmnt asserts that the simultaneous use of two witnesses was militated by the complexity of the indictment and the underlying investigation so as to enable the grand jury to hear a summary of the indictment in a logical and coherent fashion. The government therefore urges a pragmatic construction of Rule 6(d) and, in the alternative, an inquiry into whether any actual prejudice flowed from the Rinehart/James joint testimony.

The court will consider whether the Rinehart/James testimony constitutes a violation of Rule 6(d) and if so, the proper remedy for such violation.

III.

A.

Guidance in the proper construction of the phrase "witness under examination" as used in Rule 6(d)

can be found in the rule's somewhat sparse history.[6] As excerpted in *United States v. Carper*, 116 F.Supp. 817 (D.D.C. 1953), wherein three deputy marshals were present during a witness' testimony before a grand jury, the proceedings of The Institute on Federal Rules of Criminal Procedure provides the following insight into the drafter's intent:

> The minutes of the proceedings show the following discussion of Rule 6(d) by the Honorable George Z. Medalie, then Associate Judge of the New York State Court of Appeals and a member of the Supreme Court Advisory Committee:
>
> > "When I first heard of Federal criminal procedure, I found that it was the practice to try to get rid of indictments by proving that someone was in the grand jury who had no right to be there, and usually it was some deputy marshal or somebody else, some unauthorized person, and then the great to-do was how to get a person authorized. One of the ways to get a stenographer authorized in those days was to have him sworn in as Assistant United States Attorney, when he really was nothing of the kind.
> >
> > "Now, cases have come up on motions to quash because of unauthorized persons in the grand jury room, so we drew up a little list as to who is authorized. That is provided for. We say 'attorneys for the government'—the phrase 'attorney for the government' is defined and limited in Rule 27; 'the witness under examination'—no one has

[6] The Federal Rules of Criminal Procedure became effective on March 21, 1946.

> > ever moved to dismiss on account of his presence; 'interpreters when needed.' Now, here is a little touch which we picked up because of the wide geographic distribution of the membership of our committee. We didn't say 'an interpreter.' We said 'interpreters.' [We discovered that in some of the Southwestern districts it is at times necessary to have two interpreters in the grand jury room, for example, one who knows the Indian language and Spanish, but doesn't know any English—fortunately knows the Indian language, the particular Indian dialect—and another who knows Spanish. So we said 'interpreters' instead of 'interpreter.']"

116 F.Supp. at 819-20, *citing* New York University School of Law Institute—Proceedings, VI *Federal Rules of Criminal Procedure With Notes and Institute Proceedings* at 153-54 (1946) (footnote and emphasis omitted) (bracketed material deleted in court's excerpt).

As implicity recognized in Judge Medalie's comments, the rule speaks of "witness" in the singular whereas the term "interpreters" was deliberately cast in the plural. *See also* Dession, *The New Federal Rules of Criminal Procedure: II*, 56 Yale L.J. 197, 202-03 (1947). This construction is consistent with common law practice as set forth in the treatise *History of the Criminal Law of England*:

> The grand jury sit by themselves and hear the witnesses one at a time, no one else being present except the solicitor for the prosecutor if he is admitted.

J. Stephen, 1 *History of the Criminal Law of England* at 274 (1883); *see also United States v. Carper*, 116 F.Supp. 817 (D.D.C. 1953); *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947); L. Orfield, 1 *Criminal Procedure Under the Federal Rules* § 6:73 (1966).

Case law on the question of whether two witnesses may appear simultaneously before a federal grand jury, though scant, is nearly uniform in its adherence to the common law practice. In *United States v. Edgerton*, 80 F.374 (D.Mont. 1897), the presence of an expert witness who remained in the grand jury room after his testimony and observed and questioned subsequent witnesses was held to be violative of accepted grand jury practice, therefore requiring dismissal of the indictment. Similarly, in *United States v. Bowdach*, 324 F.Supp. 123 (S.D. Fla. 1971), it was held that the presence of a witness who played audio tapes for the purpose of refreshing the memory of other witnesses constituted a violation of Rule 6(d). It has likewise been held that Rule 6(d) is violated where an attorney for the government testifies before the grand jury and then, having resumed his prosecutorial role, remains in the grand jury room in the presence of other witnesses. *See United States v. Gold*, 470 F.Supp. 1336, 1351 (N.D.Ill. 1979); *United States v. Treadway*, 445 F.Supp. 959, 962 (N.D.Tex. 1978); *contra*, however, is *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979) (holding that the attorney's presence is authorized under Rule 6(d) as that of a "witness" on the one hand and as an "attorney for the government" on the other).

The government's position that the Rinehart/James joint testimony does not constitute a violation of Rule 6(d) is premised upon the rationale that practical

considerations such as the manner and mode in which evidence may be most effectively presented to the grand jury are relevant factors in construing the limits of the rule. The government cites the following excerpt from *United States v. Echols*, 542 F.2d 948 (5th Cir. 1976), in support of its position:

> [W]e read the rule as accommodating the practical exigency of making all relevant information available to the grand jury in a meaningful and understandable manner.

542 F.2d at 952.

In *Echols*, a Federal Bureau of Investigation agent appeared as a witness before a grand jury for the sole purpose of operating a cinematic projector. The court found the agent to be a "witness under examination" and thus an authorized person under Rule 6(d), holding that:

> Logic dictates that, when it is necessary for the grand jury to examine evidence which can only be presented through the use of complicated machinery, Rule 6(d) must encompass those persons with the requisite skills to operate such machines and to give testimony concerning their operations. To interpret this Rule otherwise would insulate from the grand jury the meaningful production of evidence.

542 F.2d at 952. This reading of the rule comports with the ever increasing functions witnesses may serve in both the grand jury and petit jury settings. The dictum relied upon by the government, however, does not support the conclusion that the rule authorizes joint testimony by two or more witnesses. At no time was the witness/projectionist in *Echols*

present simultaneously with another witness. *Echols* merely recognizes the nontestimonial functions a witness may serve when, for example, audio or visual evidence can only be presented by persons skilled in the use of audio and visual equipment.

B.

There are essentially two public policies ascribed by Rule 6(d). The first is that grand jury proceedings should be private, and to the greatest degree possible, secret. In *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), the Court identified five justifications which underlie the need for grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

356 U.S. at 681 n.6, 78 S.Ct. at 986 n.6, *citing United States v. Rose*, 215 F.2d 617, 628-29 (3rd Cir. 1954); *see also United States v. Treadway*, *supra* at 163.

This policy is embodied in Rule 6(e) which imposes an obligation of secrecy upon all persons identified in Rule 6(d) with the traditional exception of "the witness under examination."[7] *See* New York University School of Law Institute—Proceedings, VI *Federal Rules of Criminal Procedure With Notes and Institute Proceedings* at 154-55 (1946). Rule 6(e) further provides that upon proper notice to the court, grand jury materials may be disclosed to:

> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

Fed.R.Crim.Proc. 6(e)(3)(A)(i)-(ii).

In the case at bar, grand jury materials were provided to Agents Rinehart and James under the authority of Rule 6(e)(3)(A)(ii). The obligation of secrecy imposed upon the agents with respect to the

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[7] Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides:

> General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

materials, however, did not further extend to their joint appearances as witnesses inasmuch as Rule 6(e) provides that "[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule." *See* note 7, *supra*; *see also* L. Orfield, 1 *Criminal Procedure Under the Federal Rules* § 6:119 (1966).

Realistically, however, the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case. Rather, concern here focuses on the second public policy implicit in Rule 6(d) which serves to guard against undue influence upon grand jury witnesses or the grand jurors:

> [W]itnesses and grand jurors sitting without the protection of a presiding justice [must] be free from the risk of intimidation attendant upon the presence of numbers of prosecution witnesses, particularly police witnesses, in the grand jury.

United States v. Kazonis, 391 F.Supp. 804, 805 (D. Mass. 1975); *see also United States v. Bowdach*, *supra* at 124. In *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947), the danger of permitting two witnesses to appear simultaneously before a grand jury was noted:

> There may have been prior expressions or conversations between the two witnesses which the one then giving testimony might well hesitate to repudiate or modify in the presence of others. . . . .
>
> Such presence might also improperly suppress as well as elicit testimony . . . .

73 N.E.2d at 532. *Cf. United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

In the case at bar, the joint witness approach tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of Agents Rinehart and James and to contrast and compare the substantive evidence elicited through their testimony. Throughout their joint testimony, the agents consistently couched their remarks in terms of "we know," "we believe" and "we inquired." In several instances, an agent referred back to and restated the other agent's prior testimony. In addition, on several occasions an assistant United States attorney elaborated on the testimony of the agents, using the collective "we." [8]

The added persuasiveness resulting from the collective presentation of the agents' testimony, though difficult to assess, would not have existed had each agent testified individually, inasmuch as they would have been unable instantly to supplement each other's testimony. In assessing whether their joint testimony was unduly persuasive, it must also be noted that they were government agents who had either been previously sworn as an agent of the grand jury or had previously testified individually before the grand jury, were privy to grand jury materials, and were in command of the entire investigation of the June 6, 1979, DC-6 plane crash. The court further observes that Agent James is Agent Rinehart's superior officer within the Charleston, West Virginia, office of the Drug Enforcement Administration. *See United States v. Bowdach*, *supra* at 124 ("The potential for undue

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[8] While the substantive comments of the assistant United States attorney do not, standing alone, provide a basis for dismissal of the indictment, *see United States v. Bruzgo*, 373 F.2d 383 (3rd Cir. 1967), they are relevant to a full understanding of the impact of the Rinehart/James joint testimony.

influence . . . is made greater by the fact that the unauthorized person . . . was a government agent who possessed personal knowledge of the evidence being presented.").

C.

It is, of course, not possible to determine with certainty whether the Rinehart/James joint appearance unduly emphasized their testimony and insulated them from the critical eye generally cast upon a witness testifying individually before a jury. While the joint testimony approach was doubtless convenient to the government, it was both improper and unnecessary. Although their sworn remarks touched upon and served to integrate the whole of the superceding indictment as presented to the grand jury, their testimony could have been presented separately without impairing the ability of the government to present its case fully, fairly and nearly as expeditiously. As earlier noted, the overt acts contained in paragraph nine of the August 10th indictment were used as a blueprint for the agents' joint testimony. The same structured approach could have been employed had each agent testified individually, thereby permitting the grand jurors to better assess the personal knowledge and credibility of the two agents. Indeed, at the time of the first indictment Agent James testified individually before the grand jury on June 14, 1979, for the stated purpose, in part, of answering any questions the jurors had about the proposed June 14th indictment. As with the joint August 10th testimony, Agent James' June 14, 1979, testimony immediately preceded the grand jury's deliberations and ultimate vote in favor of the return of the June 14th indictment.

In short, the joint witness approach utilized by the government with respect to Agents Rinehart and James served no legitimate purpose and, when contrasted with the traditional one witness method of eliciting testimony, tended to inhibit the effective valuation of the agents' testimony. The rationale for the sequestration of witnesses at trial is equally applicable in this context: "[T]o prevent the possibility of one witness shaping his testimony to match that given by the other witnesses . . . ." *United States v. Leggett*, 326 F.2d 613 (4th Cir. 1964), *cert. denied*, 377 U.S. 955, 84 S.Ct. 1633, 12 L.Ed.2d 499 (1964).

A further observation. The Advisory Committee on Criminal Rules' lone comment upon Rule 6(d) as originally enacted was that it "generally continues existing law." The court's inability to discover a single published decision in either the grand jury, civil trial or criminal trial contexts where two witnesses were permitted to testify contemporaneously is persuasive proof that the government's construction of the rule is contrary both to the rule as read on its face and to the accepted common law practice.

The court accordingly holds that the joint testimony of Agents Rinehart and James resulted in the presence of an unauthorized person before the grand jury and was, therefore, contrary to and in violation of Rule 6(d). The court turns next to consider the consequences of such a violation.

IV.

While there is a split of authority among the states as to whether the presence of an unauthorized person before a grand jury is *per se* prejudicial, thereby re-

quiring dismissal of the indictment,[9] federal decisions which have addressed the point are, in the main, uniform in adhering to the *per se* rule. *See Latham v. United States*, 226 F. 420, 424 (5th Cir. 1915); *United States, v. Treadway*, 445 F.Supp. 959, 962-63 (N.D.Tex. 1978); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610, 618 (W.D.Oka. 1977); *United States v. Braniff Airways, Inc.*, 428 F.Supp. 578, 589 (W.D.Tex. 1977); *United States v. Isaacs*, 347 F. Supp. 743, 748-49 (N.D.Ill. 1972); *United States v. Bowdach*, 324 F.Supp. 123, 124 (S.D.Fla. 1971); *United States v. Borys*, 169 F.Supp. 366, 367-68 (D. Alaska 1959); *United States v. Carper*, 116 F.Supp. 817, 820 (D.D.C. 1953); *United States v. Virginia-Carolina Chemical Co.*, 163 F. 66, 75-76 (M.D. Tenn. 1908); *United States v. Edgerton*, 80 F. 374, 375 (D.Mont. 1877); *see also United States v. Echols*, 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied*, 431 U.S. 904, 97 S.Ct. 1695, 52 L.Ed.2d 387 (1977); *United States v. Fall*, 10 F.2d 648, 649 (D.C.Cir. 1925); *United States v. Gold*, 470 F.Supp. 1336, 1351 (N.D.Ill. 1979); *United States v. Daniels*, 370 F. Supp. 1289, 1296 (W.D.N.Y. 1974); *United States v. Boyle*, 338 F.Supp. 1028, 1036 (D.D.C. 1972); *United States v. Powell*, 81 F.Supp. 288, 291 (E.D.Mo. 1948); *United States v. Amazon Industrial Chemical Co.*, 55 F.2d 254, 261-62 (D.Md. 1931); *United States v. Goldman*, 28 F.2d 424, 426-31 (D.Conn. 1928); W. Whitman, *Federal Criminal Procedure* § 6.9 (1950); *but see United States v. Birdman*, 602 F.2d 547, 556-

[9] *Compare State v. Manney*, 24 N.J. 571, 133 A.2d 313 (1957) (dismissal not warranted in the absence of actual prejudice), *with People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947) (unauthorized person held to be a *per se* basis for dismissal).

58 (3rd Cir. 1979), *cert. denied*, 445 U.S. 906, 100 S.Ct. 1084, 63 L.Ed.2d 322 (1979); *United States v. Terry*, 39 F. 355 (N.D.Cal. 1899).

Justification for the *per se* rule is in part founded on the premise that a case-by-case analysis to determine whether the defendant was actually prejudiced would require a detailed inquiry that inevitably frustrates and undermines the secrecy of grand jury testimony. *Untied States v. Treadway, supra.* Of at least equal concern is the difficulty inherent in ascertaining whether actual prejudice resulted. It is said that requiring a showing of actual prejudice or a substantial likelihood of potential prejudice for the condonation of the exercise of undue influence and, further, that a standard of actual or even potential prejudice would impose upon the court a difficult burden that would outweigh the benefits to be derived. *See* Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* at 914 (4th ed. 1974). Utilization of the *per se* rule of dismissal may also fulfill in a given case the public policy of assuring fairness in the processes of justice, a policy which underlies the supervisory powers of the federal courts. *United States v. Birdman, supra* at 557, 558-60.

Yet, the instant case is markedly distinguishable from the legion of cases indiscriminately applying the *per se* rule. The violation of the one-witness requirement here occurred only in connection with the second, or superceding, indictment of August 10th under which the defendants were tried. The first indictment, then, was uninfected by the Rule 6(d) violation. It is especially significant to note that the two indictments were returned by the same grand jury. The court's review of the attendance and voting records of that grand jury reveals that each of these

indictments was returned by a unanimous vote. A nucleus of the same seventeen grand jurors voted for each indictment. In addition, one other grand juror voted for the first indictment but did not vote on the second, while two others voted for the second indictment but did not vote on the first.

Several of the counts in the two indictments are identical or virtually so. So it is that the counts of the August 10th indictment which are identical to the same counts contained in the June 14th indictment have a probable cause basis entirely independent of the testimony presented to the grand jury after the return of the first indictment. Such is the case with respect to the substantive counts of which the defendants Lill and Mechanik stand convicted. Mechanik was found guilty under the tenth count which is identical to the sixth count in the first indictment. Lill was convicted of the second and fourth counts which are identical in both indictments except for the inconsequential fact that Gregory Louis McCafferty was charged as a fourth defendant in those same counts in the first indictment but not in the superceding indictment.[10]

Thus, as to Lill and Mechanik on the substantive counts, there was neither prejudice nor potential for prejudice. Where neither is present, application of the *per se* dismissal rule is without virtue save for exemplary purposes. As will be developed, it is by no means necessary to dismiss the Lill and Mechanik substantive counts in order to assure future adherence by the prosecutor to the one-witness requirement.

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[10] The grand jury, in so doing, simply took McCafferty off the plane where he had been charged in the first indictment along with Lill and two others and placed him instead in the second indictment as a codefendant on the ground.

The only remaining count requiring attention is the first count which, in both indictments, charges the offense of conspiracy. Defendants Lill, Mechanik, Zarintash and Riddle were found guilty on the conspiracy count, with the jury being unable to reach a verdict as to defendant Mark Chadwick. In the second indictment there were a number of alterations and additions to the conspiracy count as it had appeared in the first indictment. Each of them was the subject of the Rhinehart/James joint testimony. The alterations and additions remaining in the redacted version of the second indictment on the basis of which the case went to the jury are set forth below. In each instance the alteration and addition was either supported by testimony apart from the Rinehart/James joint testimony or became moot by virtue of the acquittal of Kook and James Chadwick:

Addition of two defendants, James Chadwick and Russell Kook. (Both acquitted.)[11]

Alteration of the origination point of the flight as being San Marcos in Columbia, South America, instead of San Marcos, Guatemala. (Supported in part by Rebecca Markos' testimony.)

Alteration of McCafferty's placement so as to allege that he was waiting at the airport, after having traveled in interstate commerce, to meet the DC-6 plane and receive its contraband cargo on the morning of June 6, 1979, instead of being placed on the plane. (Supported by Agent James' earlier solo testimony of August 2, 1979.)[12]

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[11] A third added defendant, McGilvray, is a fugitive who was not tried and remains at large. For failure of proof, he was struck from the redacted version of the second indictment.

[12] At the conclusion of Agent James' solo testimony of August 2, 1979, Assistant United States Attorney Hoffman

Addition of James Chadwick as one who along with Mark Chadwick as originally charged, was also named as providing a safe place for the DC-6 to land. (James Chadwick acquitted.)

Addition of Mark Chadwick and James Chadwick as providing a safe place for the cargo of the DC-6 to be unloaded and a safe departure from the airport for the defendants and coconspirators. (James Chadwick acquitted. Testimony in connection with the conspiracy count of the first indictment, which charged Mark Chadwick with providing a safe place for the DC-6 to land, was sufficient to support the inclusion of a charge against him of providing as well a safe place for unloading the cargo and safe departure for the defendants and coconspirators. Moreover, count one of the first indictment had specifically charged that Mark Chadwick aided the flight of certain of the defendants after the DC-6 crash.)

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cautioned the grand jury that they should not consider James' testimony on that occasion, at least to the extent given in summary form, as evidence that "would go toward probable cause of anybody else's involvement in these facts" (Court *In Camera* Ex. 42 DD, p. 9). It is observed that James' solo testimony which serves to place McCafferty on the ground rather than on the plane, as well as his testimony on the same occasion with respect to the Ryder truck rentals and travel from Cleveland which were added as overt acts, was not presented in summary form nor did it constitute a showing of probable cause of the involvement of others not named as defendants to the first indictment. Consequently, while acknowledging that the scope of the Assistant United States Attorney's disclaimer is not free from doubt, the court chooses to treat the James solo testimony just noted as evidence for consideration by the grand jury. It is further noted that each of the overt acts relating to Ryder truck rentals were proved at trial beyond any doubt.

Addition of seven overt acts alleging rental of Ryder trucks, namely, two in Charleston, West Virginia, by defendant Mechanik and five in Cleveland, Ohio, by defendant McCafferty. (Marsha Miller's testimony supported the Ryder rentals in Charleston on April 21 and 28, 1979, appearing as overt acts d and k. Agent James in his solo testimony of August 2, 1979, established the first two McCafferty rentals in Cleveland as having occurred at the same time as the two rentals just noted in Charleston, being spelled out in overt acts c and 1 as April 20 and April 28, 1979. Rebecca Markos tended to support the third Ryder rental in Cleveland by McCafferty, which occurred as set forth in overt act q on May 5, 1979, by her testimony that she had seen McCafferty in a Ryder truck in early May 1979. The James solo testimony of August 2, 1979, also supported the June 3, 1979, rental by McCafferty in Cleveland as set forth in overt act y, as well as the exchange for the larger truck on June 5, 1979, as charged in overt act cc, which is also supported by the Rebecca Markos testimony.)[13]

Addition of two overt acts, dd and ff, alleging interstate travel to West Virginia. (Both James' solo testimony of August 2, 1979, and Rebecca Markos' testimony support overt act ff charging travel from Cleveland on June 5, 1979.[14] William Clippard's testimony supporting the Spartanburg, South Carolina, rental by Mechanik on June 4, 1979, coupled with the White family

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[13] *Id.* n. 12, at 59.

[14] *Id.* n. 12, at 59.

testimony, serves to substantiate overt act dd of the same date charging travel from Spartanburg.)

Addition of overt act ii respecting James Chadwick's arrival at the jail at about 12:15 a.m. on June 6, 1979 (Supported by testimony of Kanawha County deputy sheriffs, Sergeant Larry Mullins and Corporal John Meadows. (James Chadwick acquitted.)

Addition of overt act gg respecting defendant Kook as having registered at a Ripley, West Virginia, motel on June 5, 1979 (Kook acquitted.)

Other alterations and additions to the indictment for which the joint testimony of Agents Rinehart and James was responsible were either stricken on motion at trial or resulted in acquittal. Their testimony was the basis for adding Russell Kook not only as a defendant charged with conspiracy in count one but also with a substantive offense in the seventh count. As noted, Kook was acquitted. The Rinehart/James testimony served to summarize the telephone toll records subpoenaed by the grand jury and resulted in adding to the conspiracy count the allegation, later stricken by the court at the close of the evidence, that the defendants, as one of four objects of the conspiracy specified in count one, conspired to unlawfully use a telephone communication facility in violation of 21 U.S.C. § 843(b).[15] Also stricken

[15] The alleged unlawful use of a telephone communication facility was inserted in the second indictment, taking the place of the charge of obstruction of justice as one of the four objects of the conspiracy. Remaining unchanged were the other three alleged objects of the conspiracy, consisting of unlawful possession with intent to distribute a controlled substance, interstate travel with intent to promote an unlawful activity and importation of a controlled substance.

were the twenty-one overt acts involving the telephone network alleged to exist between the defendants.

Insofar, then, as the joint testimony of Agents Rinehart and James ultimately proved to be material, the grand jury also had before it ample independent evidence to support a probable cause finding of the charges as contained in the redacted version of the conspiracy count on which the case went to the trial jury, except as to defendant Kook and possibly defendant James Chadwick who were, of course, acquitted. Although the grand jury would, in my view, undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately, it must again be acknowledged that a potential for prejudice by virtue of their joint testimony did exist. And, in the sense that all things are possible, even actual prejudice is conceivable. Yet, the existence of actual prejudice as to the conspiracy count is so utterly remote and the absence of actual prejudice as to the Lill and Mechanik substantive counts is so plain that a mere possibility of prejudice can appropriately be disregarded.

If the issue on which the court now passes were being squarely faced prior to trial, dismissal might well be decreed as the proper and prudent course. Pretrial dismissal would serve the salutary disciplinary function of underscoring the care which the prosecutor must observe in meeting the requirements of Rule 6(d) without, as in this case, conferring a windfall benefit on four defendants who stand convicted after a three-month trial conducted at enormous expense to the United States and the defendants.

Indeed, a review of the numerous district court cases cited *supra*, at 57-58, as adopting the *per se*

dismissal rule discloses without exception that dismissal was ordered before trial.[16] The two remaining cases, which dealt with dismissal after trial, consist of the Fifth Circuit case of *Latham v. United States*, 226 F. 420 (5th Cir. 1915), in which the *per se* dismissal rule was applied, and the Third Circuit case of *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979), *cert. denied*, 445 U.S. 906, 100 S.Ct. 1084, 63 L.Ed.2d 322 (1979), in which the *per se* rule was avoided. Interestingly, even in the *Latham* case the utilization of the *per se* dismissal rule was of little moment inasmuch as the trial court conviction was also being reversed because of prosecutorial misconduct.

Rule 6(d) does not prescribe the sanction to be imposed for its violation. The rulemakers have wisely left to the courts the responsibility of fashioning sanctions appropraite to the circumstances. In this case it is sufficient that action be taken to guard against the future violation of the one-witness requirement. In order to assure that the one-witness rule is observed in subsequent grand jury proceedings, the prosecutor will henceforth be directed routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled. It is observed that the court will be in a position to monitor the accuracy of the reporting process not only through Title 18, United States Code, § 3500 disclosure, but also by virtue of the increasing frequency with which the court is

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[16] The court notes parenthetically that in several of the cases cited *supra* at 57-58, the question of dismissal was not reached, *see e.g., United States v. Isaacs, supra,* or dismissal was ordered for more than one reason, *see, e.g., United States v. Braniff Airways, Inc., supra.*

called upon to review grand jury material for various *in camera* purposes.

V.

It is accordingly ORDERED that the motions of the defendants to dismiss the indictment by reason of the Rule 6(d) violation be, and the same are hereby, denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5166

UNITED STATES OF AMERICA, APPELLEE

v.

MARSHALL MECHINIK, a/k/a
MICHAEL PATRICK FLANAGAN, APPELLANT

No. 80-5167

UNITED STATES OF AMERICA, APPELLEE

v.

SHAHBAZ SHANE ZARINTASH, APPELLANT

No. 80-5168

UNITED STATES OF AMERICA, APPELLEE

v.

JEROME OTTO LILL, STEVEN HENRY RIDDLE,
APPELLANTS

No. 80-5169

UNITED STATES OF AMERICA, APPELLEE

v.

MARK DOUGLAS CHADWICK, APPELLANT

[Filed July 24, 1984]

ORDER

Upon consideration of the government's motion for leave to file petition for rehearing and rehearing in banc out of time, the government's petition for rehearing and rehearing in banc, appellant Mechanik's motion to recall and stay mandate and appellant Lill's motion to join in motion to recall and stay mandate,

IT IS ORDERED that the motions filed by Mechanik and Lill to recall and stay the mandate are denied. Appellants are directed to respond to the government's petition for rehearing and suggestion for rehearing in banc on or before *August 3, 1984* in the office of the clerk.

Entered at the direction of Judge Butzner for a panel consisting of Chief Judge Winter, Judge Hall, and Judge Butzner.

For the Court,

/s/ JOHN M. GREACEN
Clerk

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OPPOSITION

BRIEF

Office - Supreme Court, U.S.
FILED
MAY 15 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1640

In The
Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

MARSHALL MECHANIK, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR SHAHBAZ SHANE ZARINTASH IN OPPOSITION

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QUESTIONS PRESENTED

1. Where respondents have been reindicted and the charges disposed of by guilty pleas, does dismissal of the previous indictment merit review by this Court?

2. Whether an indictment should be dismissed where an assistant United States attorney called two DEA agents to testify in tandem before a grand jury for almost an hour in direct defiance of Rule 6(d) of the Federal Rules of Crimnial Procedure?

3. Where the prosecutor deliberately called two DEA agents before a grand jury and had them testify together, must a district court find additional, actual prejudice to the defendant before it can dismiss the indictment without prejudice to resubmit it to another grand jury?

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No. 84-1640

—o—

In The
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

—o—

BRIEF FOR SHAHBAZ SHANE ZARINTASH IN OPPOSITION

—o—

OPINIONS BELOW

The per curiam opinion of the Court of Appeals on rehearing in banc (Pet. App. 1a-13a) is not yet reported. The panel opinion (Pet. App. 14a-25a) is reported at 735 F.2d 136. The opinion of the district court (Pet. App. 26a-53a) is reported at 511 F.Supp. 50.

JURISDICTION

The judgment of the in banc court was entered on March 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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STATEMENT

Inexplicably missing from the Government's statement of the case is any mention of the fact that there has already been a reindictment in this case and two of the respondents have entered guilty pleas disposing of these charges. Moreover, the remaining two respondents received concurrent prison sentences on the convictions that were reversed and those that were affirmed, and their status was unaffected by the Court of Appeals' decision. Thus no "windfall benefit" (Pet. 15) was conferred on respondents by reversal of their tainted conspiracy convictions.

On May 16, 1984, a panel of the United States Court of Appeals reversed the narcotics conspiracy convictions of respondents Mechanik, Lill, Zarintash and Riddle, but affirmed the convictions of Mechanik and Lill for substantive violations (Pet. App. 22a). Since Mechanik and Lill had been sentenced to concurrent five year terms of imprisonment, their sentences of incarceration remained undisturbed by the Court of Appeals' decision.

On June 4, 1984, three weeks after the panel's decision, respondents Riddle and Zarintash were reindicted on charges identical to those in the indictment dismissed by the Court of Appeals (S.D.W.Va. Indictment No. 84-

20028). On September 26, 1984, respondent Riddle pled guilty to these charges. On April 2, 1985, in the District of New Jersey, respondent Zarintash pled guilty to various narcotics offenses under an agreement disposing of all federal charges against him, including those in this very indictment in the Southern District of West Virginia. Despite the reindictment and guilty pleas of Zarintash and Riddle, the Government has nevertheless pushed on with this litigation, first petitioning the Court of Appeals for rehearing in banc and then petitioning this Court for certiorari, all the while lamenting the enormous expenditure of resources required for such litigation (Pet. 10-11, 15). With this as necessary prologue, the facts of the case are as follows.

At 12:53 A.M. on June 6, 1979, a DC-6 aircraft landed at the Kanawha County airport, outside of Charleston, West Virginia. The plane's brakes failed and it crashed (A1872*). When the plane broke open large quantities of marijuana spilled about the hillside (A1885). This ill-fated accident launched an investigation that ultimately ended in the return of a 12-count indictment charging 12 defendants with conspiracy and various substantive offenses.

On August 10, 1979, a 12-count superseding indictment was returned which essentially expanded the conspiracy charge greatly. The trial commenced on February 22, 1980, and on June 22, 1980, after five days of deliberation, the jury convicted the respondents Lill and

---

* Numerals preceded by "A" refer to the pages of the Joint Appendix in the Court of Appeals.

Mechanik of conspiracy and certain substantive offenses and respondents Riddle and Zarintash of conspiracy only. They were each ultimately sentenced to five years' imprisonment and fined.*

On August 10, 1979, two DEA agents, Jerry Rinehart (the officer in charge of this investigation as well as the first agent to reach the scene immediately after the plane crash) and Randolph James, appeared simultaneously before the grand jury that ultimately indicted the respondents. Incredible as it may seem, the two men were sworn contemporaneously and testified together before the grand jury for approximately one hour. Each remained in the grand jury room during the testimony of the other.

The district court found they gave intertwining testimony, with one witness being permitted to add to the testimony of the other witness before the questioning of the former witness continued. On several occasions, gaps in the personal knowledge of a witness would be obscured by reference to what "we" did, knew or observed. The two witnesses, testifying together, literally summarized the entire case before the grand jury. The witnesses testified for almost one hour and their testimony covered 61 pages of the grand jury transcript. On the very same day that these two witnesses appeared collectively, the grand jury voted a superseding indictment.

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* Two other defendants, James F. Chadwick and Russell Kook were acquitted. The jury was unable to reach a verdict on the case of Mark Douglas Chadwick, and a mistrial was declared. Four of the original 12 defendants pleaded guilty to the conspiracy count prior to trial. Another defendant is a fugitive.

The Government's petition does not mention that in advance of trial the respondents endeavored to discover whether Rule 6(d) had been breached. Respondent Zarintash, at page 60 of his omnibus motion, requested that the Government provide a list of all persons who appeared before the grand jury, for the specific purpose of determining whether any unauthorized persons entered the grand jury room (A136). In the face of this unambiguous request, made at a time when the error could have been corrected with a minimum of disruption and expense, the prosecution circled its wagons and denied that the two witnesses testified before the grand jury jointly.*

During the second week of trial, on February 28, 1980, defense counsel discovered, quite fortuitously, the DEA agents' dual appearance before the grand jury, when portions of Jerry Rinehart's grand jury testimony were delivered to defense counsel as "3500" material. Counsel immediately moved for a dismissal of the indictment. Judge Dennis R. Knapp denied the motion, somehow finding there was no violation of Rule 6(d). Desperate to forestall a lengthy trial that was clearly infected with error, the defendants then sought a stay of the proceedings and initiated an interlocutory appeal to the Court of Appeals for the Fourth Circuit. On April 10, 1980, respondents' petitions for a writ of mandamus and a writ of prohibition were denied as premature, and they were forced to proceed with the trial.

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* The Government conceded during oral argument before the panel in the Fourth Circuit that the prosecution had denied any such irregularity.

Judge Copenhaver Found Rule 6(d) Was Broken And Recognized A Potential For Prejudice

Judge Knapp suffered a heart attack on April 25, 1980 and the trial was transferred to the Honorable John T. Copenhaver. On May 22, the defendants, still anxious to prevent a needless expenditure of time and resources, renewed their motion to dismiss because of the violation of Rule 6(d). Judge Copenhaver, obviously disturbed by this breach of grand jury procedure and with the opportunity to abort a meaningless trial, nevertheless reserved decision. After the return of the jury's verdict, on August 15, 1980, in a lengthy opinion, the court concluded that the joint appearance of the two DEA agents before the grand jury clearly violated Rule 6(d). (Pet. App. 43a) He also acknowledged the potential for prejudice. The trial court made some critical findings that deserve emphasis in this Court. For instance, the trial judge was forced to recognize that the joint witness approach "tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of [the agents]. . . . Throughout their joint testimony, the agents consistently couched their remarks in terms of 'we know,' 'we believe,' and 'we inquired.'" (Pet. App. 41a)

The trial court noted the corroborative effect of this joint testimony by pointing out how the agents "referred back to and restated the other agent's prior testimony." (Pet. App. 41a) The court also concluded that the superior position of Agent James to that of Mr. Rinehart created additional problems, and recognized that the potential for undue influence was enhanced because the subordinate officer would not contradict his superior. The court further found that there was a real danger of the two agents'

tailoring their testimony by acknowledging that the "rationale for sequestration of witnesses at trial is equally applicable in [the grand jury] context: '[T]o prevent the possibility of one witness shaping his testimony to match that given by other witnesses. . . .'" (Pet. App. 43a)

In the face of these compelling findings, nevertheless the court concluded that the indictment should not be dismissed. The trial judge declined to do so because he felt it would confer "a windfall benefit on four defendants who stand convicted after a three-month trial conducted at enormous expense to the United States and the defendants." (Pet. App. 51a) Ironically, it was the district court itself which had failed to dismiss the indictment earlier and had unwisely reserved judgment pending the outcome of the trial.

The Court Of Appeals' Decision

Chief Judge Winter and Circuit Judge Butzner in the panel decision, the reasoning of which was adopted by the in banc court, acknowledged that Rule 6(d) "is designed, in part, to insure that grand jurors, sitting without the direct supervision of a judge, are not subject to undue influence that may come with the presence of an unauthorized person." (Pet. App. 17a). The court, stressing that other courts have consistently held that the presence of one witness during the testimony of another witness at grand jury proceedings invalidates the indictment, pointed out that "the Government cites no case to the contrary. Consequently, each agent was an unauthorized person at the grand jury sessions anytime the other agent was testifying." (Pet. App. 18a)

The Court of Appeals explained that a clear-cut, deliberate breach of Rule 6(d) requires the invocation of *per se* rule because:

> "Rule 6(d) is plain and unequivocal in limiting who may appear before a grand jury. Requiring a defendant to show prejudice would impose a difficult burden that could undermine the protection that the rule provides [citation omitted.] Indeed, most federal courts considering the matter have agreed that a showing of prejudice is not necessary to dismiss an indictment because of a Rule 6(d) violation." (Pet. App. 19a)

Nevertheless, the Court of Appeals found that respondents were prejudiced:

> "The agents, alternating their testimony before the grand jury, referred to themselves as the collective 'we,' backed up each other in the description of incriminating evidence, and supplemented each others' presentation. This joint effort could have added to each agent's credibility and could have had an undue influence on the grand jury's decision to return the superseding indictment, especially where both witnesses were government officials." (Pet. App. 20a)

———o———

ARGUMENT

Review of the Court of Appeals' decision is unwarranted because a real and substantial controversy admitting of specific relief no longer exists. Respondents Zarintash and Riddle have already been reindicted and the charges have been disposed of by guilty pleas. Reinstatement of the dismissed indictment would therefore result in a meaningless redundancy. In view of the reindictment and guilty pleas, if the indictment *sub judice* were reinstated, the Government would very likely be forced to move in the district court for its dismissal. Similarly, reinstatement of the dismissed conspiracy count would have absolutely no impact on respondents Lill and Mechanik since, by virtue of the concurrent sentences imposed upon them, they remain unaffected by the Court of Appeals' reversal of their conspiracy convictions. Under no set of circumstances will a new trial be required in this case.

Thus the Government, in seeking a vehicle for the broad expansion of the law which it promotes in its petition, has selected a singularly inappropriate case. Having chosen to reindict respondents and to accept guilty pleas, effectively rendering moot the Court of Appeals' reversal, the Government may not now ask for, in essence, an advisory opinion on an abstract issue.

It is deeply ironic that the Government seeks to lay at the feet of respondents the "grave cost" (Pet. 11), the "enormous expense" (Pet. 15) and the "extravagant cost" (Pet. 15) of reversing convictions and conferring on respondents "windfall benefits." At every stage of this litigation it has been the Government, not respondents, who have promiscuously squandered the resources of both the judicial system and of the respondents. It was the prosecution who knew that two DEA agents had testified simultaneously before the grand jury, but failed to disclose this fact. Even after respondents had expressly inquired in pretrial motions as to any such flaw, the prosecution continued to conceal it. It was the Government that knowingly permitted the ill-begotten trial to commence and who resisted every timely effort to rectify the error before further damage was done.

Had respondents brought their Rule 6(d) complaint, for the first time, after trial, then arguably the Government's contention might have some marginal merit. But it was the respondents who strove at every stage to prevent the trial from proceeding after discovery of the Government's breach. The Government now concedes that "the most specific and tailored remedy would be to require the government to correct the error—that is, to present its case anew to a grand jury in compliance with Rule 6(d)." (Pet. 14 n. 9) This remedy is precisely what the respondents' quick reaction to their discovery of the defect gave the district court the opportunity to do. Respondents did not cynically save the error for use on appeal in the event of conviction. They sought at the earliest possible opportunity to mitigate the damage and forestall a meaningless trial. It was the Government, not the respondents, who resisted this prudential course.

That it took the Court of Appeals to reverse the district court's improvident denial of the respondents' timely motion should not redound to their detriment. A defendant should not be afforded *less* protection simply because a trial judge erred in denying his mistrial request. Yet the Government, throughout its petition, urges precisely this and repeatedly argues that a defendant is not entitled to review of a grand jury defect after he has stood trial and been convicted, because reversal confers "a windfall benefit on four defendants who stand convicted after a three-month trial conducted at enormous expense to the United States and the defendants." (Pet. 15) Having committed the initial error, having concealed it, having permitted the trial to commence, and having urged denial of respondents' timely motion for a mistrial, surely the Government cannot be heard to make such a disingenuous argument. To do so would reward the prosecution for succeeding in commencing and seeing through to completion a three-month trial, when it was improper to do so.

The Government argues (Pet. 14, 15) that respondents' interests should be balanced against competing interests, including "society's interest in the administration of justice" and the "extravagant cost on society" of a reversal. We agree that society's interest in the administration of justice is an important consideration in this case. However, we contest that this is a "competing interest" as to *respondents*. To the contrary, society's interest in the administration of justice—including faithful adherence to the Federal Rules of Criminal Procedure—is exactly what respondents have been striving to vindicate. It has been the *Government's* conduct throughout this entire litigation, up to and including the filing of a petition for certiorari notwithstanding reindictment, that is in sharp conflict with "society's interest in the administration of justice." That interest has been trampled upon by the Government for almost six years. Prompt denial of the instant petition is therefore warranted.

There Is No "Conflict In The Circuits"

The in banc decision of the Court of Appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review, therefore, is not warranted. In an unbroken series of cases extending over a long stretch of our judicial history, it has been held postulate that the presence of an unauthorized person in the grand jury room for any significant duration of time mandates that the indictment be dismissed. The

cases collected in the margin* of this brief bear testament to this time-honored national policy. The uni-

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* Indictments were dismissed because unauthorized persons appeared in the grand jury room in the following cases:

United States v. Edgerton, 80 F. 374 (D. Mont. 1897) (expert witness remained after testifying and asked questions of another witness); *Latham v. United States,* 226 F. 420 (5th Cir. 1915) (unauthorized person was present to record testimony throughout grand jury proceedings); *United States v. Carper,* 116 F.Supp. 817 (D.D.C. 1953) (deputy marshals present throughout testimony of prisoner witnesses); *United States v. Borys,* 169 F.Supp. 366 (D. Alaska 1959) (mother of witness present throughout daughter's testimony); *United States v. Bowdach,* 324 F.Supp. 123 (S.D. Fla. 1971) (FBI agent called upon by prosecutors to enter grand jury room to play a recording device during testimony of a witness); *United States v. Daneals,* 370 F.Supp. 1289 (W.D. N.Y. 1974) (unauthorized agency regional counsel appeared and advised grand jury); *United States v. Braniff Airways, Inc.,* 428 F.Supp. 579 (W.D. Tex. 1977) (unauthorized person present throughout as observer and assistant prosecutor); *United States v. Phillips Petroleum Co.,* 435 F.Supp. 610 (N.D. Okla. 1977) (unauthorized person was present throughout testimony of a witness and conducted part of questioning); *United States v. Gold,* 470 F.Supp. 1336 (N.D. Ill. 1979) (government attorney who testified before a grand jury and then resumed prosecutorial role violated Rule 6[d]); *United States v. Treadway,* 445 F.Supp. 959 (N.D. Tex. 1978) (attorney for antitrust division appeared before a grand jury and remained after testifying in violation of Rule 6[d]); *United States v. Boyle,* 338 F.Supp. 1028 (D.D.C. 1972) (presence of unauthorized person in grand jury room raises presumption of prejudice; however, court refused to dismiss indictment because defendant failed to set forth sufficient facts in support of claim); *United States v. Goldman,* 28 F.2d 424 (D. Conn. 1928) (presence of a special assistant acting as stenographer was unauthorized); *United States v. Philadelphia RRwy Co.,* 221 F. 683 (E.D. Pa. 1915) (presence of attorneys who were stenographers before grand jury constituted unauthorized personnel); *United States v. Rubin,* 218 F. 245 (D. Conn. 1914) (presence of unofficial stenographer taking shorthand before grand jury was unauthorized); *United States v. Heinz,* 177 F. 770 (S.D.N.Y. 1910) (expert accountant

(Continued on following page)

fying theme of this constellation of cases is a recognition that a violation of Rule 6(d) requires that the indictment be dismissed because the consequence is one of plain error.

The Government seeks (Pet. 20-21) to create a "conflict in the circuits" by citing *United States v. Condo,* 741 F.2d 238 (9th Cir. 1984), *cert. denied,* No. 84-5793 (Jan. 14, 1985); *United States v. Kahan & Lessin Co.,* 695 F.2d 1122 (9th Cir. 1982); and *United States v. Rath,* 406 F.2d 757 (6th Cir.), *cert. denied,* 394 U.S. 920 (1969). These cases all involved fleeting intrusions into the grand jury room, during which the proceedings were abruptly halted. Thus they are totally inapposite to the egregious, deliberate and lengthy violation that occurred in this case and hardly "conflict" with the Court of Appeals' decision here or the holdings of any other circuit.

(Continued from previous page)

in grand jury room to assist in the handling of technical questions with accountant witnesses was unauthorized—*prejudice is presumed in law.); United States v. Newman,* 534 F.Supp. 1113 (S.D.N.Y. 1982) (Government sought to have indictment dismissed without prejudice because unauthorized special assistant in grand jury room); *United States v. Pignatiello,* 582 F. Supp. 251 (D. Colo. 1984) (presence of unsworn SEC attorney required *per se* dismissal); *see also State v. Frazier,* 252 S.E.2d 39 W. Va. 1979); *Coblentz v. State,* 164 Md. 558, 166 A. 45, 48-49 (1933); *Corbin v. Boardman,* 6 Ariz. App. 426, 433 P.2d 289, 294-296 (1967) (apparent *per se* rule); *State v. Revere,* 232 La. 184, 94 So.2d 25, 33-34 (1957); *Commonwealth v. Harris,* 231 Mass. 584, 121 NE 409 (1919); *State v. District Court of First Judicial District,* 220 P.2d 1035, 1051 (Mont. 1950); *State v. Hill,* 88 N.M. 217, 539 P.2d 236, 239-40 (1975); *People v. Minet,* 296 N.Y. 315 (1947); *State v. Johnson,* 214 NW 39, 41 (N. Dak. 1927) (apparent *per se* rule); *Hammers v. State,* 337 P.2d 1097, 1109-1110 (Okla.Cr. 1959); *Meyers v. Second Judicial District Court in and for Weber County,* 156 P.2d 711, 714 (Utah 1945).

Indeed a Fifth Circuit case analogous to this one demonstrates the solidarity of the courts of appeals in assuring that 6(d) breaches do not go unremedied. In *United States v. Fulmer,* 722 F.2d 1192 (5th Cir. 1983), the Government turned over Jencks Act material to the defense during the trial. Counsel discovered that an FBI agent was not sworn as a witness when he read prior grand jury testimony to the grand jury that returned, as here, a superseding indictment. The district court granted Fulmer's motion to dismiss the indictment because the FBI agent was not a *sworn* witness and thus was not authorized to be present under Rule 6(d). Indeed, in *Fulmer,* the district court dismissed with prejudice.

On appeal to the Fifth Circuit the Government *conceded that the dismissal was proper,* and argued only that the dismissal should have been, as here, without prejudice. 722 F.2d at 1195. Despite this concession the Fifth Circuit took pains to point out:

> "In *Latham* [v. *United States,* 226 F. 420 (5th Cir. 1915)] this Court held that the presence of an unauthorized person results in *per se* invalidity of the indictment. No showing of prejudice is required to quash an indictment secured with the presence of unauthorized persons in the grand jury room." 722 F.2d at 1195 n. 5.

Significantly, within the last few years this Court has strictly construed other parts of Rule 6 of the Federal Rules of Criminal Procedure. For example, the Court has declined to allow any disruption of a grand jury's secrecy unless a "particularized need" is clearly demonstrated. *United States v. Sells Engineering Inc.,* 103 S.Ct. 3133 (1983); *United States v. Baggot,* 103 S.Ct. 3164 (1983); *Illinois v. Abbott and Associates Inc.,* 460 U.S. 557 (1983); *Douglas Oil Co. of California v. Petrol Stops Northwest,* 437 U.S. 902 (1979).

A voyage back through our constitutional history reveals no case where this Court has ever relaxed the strict requirements of grand jury due process. The trajectory of this formidable array of authorities reflects a national policy of stringently preserving the integrity and secrecy of the grand jury. For these ideals to prosper, it is imperative that Rule 6(d) remain unintimidated. The flourishing of this principle of grand jury due process evidences an unfailing faith in the doctrine that strict limits must be placed on a prosecutor's "doubling up" of witnesses before the grand jury. If we are to keep faith with these ancient rules, we simply cannot tolerate the extravagant indulgencies engaged in here by the Government.

Congress Intended That Rule 6(d) Be Strictly Enforced

When Congress enacted Rule 6(d), strictly limiting who may appear before a grand jury, it was for the purpose of protecting the grand jury's secrecy as well as preserving its independence. The rule itself exemplifies a policy of strictly guarding the grand jurors against any risk of being intimidated by unauthorized officials or witnesses who may deliberately or inadvertently venture into the grand jury room. Thus it is apparent that prejudice attaches automatically when the rule is breached, for noncompliance clearly deprives a suspect of the safeguards Congress sought to afford to every person who is investigated by a grand jury.

The Federal Rules of Criminal Procedure have the force and effect of statutory law and are binding on the federal courts. *United States v. Whited,* 454 F.2d 642 (8th Cir. 1972); *Dupoint v. United States,* 388 F.2d 39 (5th Cir. 1967); *United States v. Virginia Erection Corp.,* 335 F.2d 868 (4th Cir. 1964). Rule 6(d), which is unambiguous, provides that only certain enumerated persons are authorized to be present while the grand jury is in session. Had Congress intended to make the invocation of this rule discretionary, it would have written 6(d) to reflect that intent by broadening its scope with general language. Or, it may have indicated that a breach of the rule would not be deemed to "affect the substantial rights" of defendants or that "the court for good cause shown" may excuse a breach. *Cf.* Rule 12(f). However, Rule 6(d) was built without any such safety valves. Rather, Congress took great pains in Rule 6(d) to carefully describe those persons authorized to be present in the grand jury room. Thus Congress' ironclad intent, clearly manifested in the language of the rule, cannot be brushed aside by reading into the statute a "showing of prejudice" ingredient.

It is for this reason that Rule 6(d) has historically been strictly enforced, particularly because there is an unusually high risk of prejudice to a party and the existence of that unconventional prejudice may be difficult to establish. Therefore to maintain a social policy as important as the integrity of the grand jury requires a straight prophylactic rule. Certainly this Court should give weight to the staggering array of authority from courts throughout the country which endorses an unbending, *per se* rule concerning violations of 6(d)'s strictures.

To embalm this important rule in a discretionary doctrine of demonstrated prejudice would mark an abrupt departure from the important policy of strictly enforcing Rule 6(d).

Constitutional Considerations

Constitutional considerations required that the indictment in this case be dismissed. The Fifth Amendment to our Constitution mandates that no person shall be held to answer for an infamous crime unless on an indictment of a grand jury. The idea underlying this provision was to preserve on the English model a fair method for instituting criminal proceedings against persons believed to have committed crimes. The Grand Jury was created as an investigative and accusatory body made up of laymen from the general population and given the function of assessing the sufficiency of the prosecutor's case. The purpose of using laymen was to insulate the subject of the inquiry from governmental excesses.

Divorced from the control of government, grand jurors were free to make their presentments and indictments as they deemed fit. Since they were to be left to their own wits and free from prosecutorial cozening, they were neither hampered by nor guided by technical legal rules of procedure or evidence. But the suspension of these rules presupposed adherence to a prior set of rules which insured the grand jury's independence and integrity. Since the cardinal purpose of the grand jury, therefore, is to act as a shield against prosecutorial excesses, this protection is lost and the integrity of the criminal justice system is impaired when the rules governing the conduct of the grand jury are disobeyed.

Thus, when reviewing challenges to indictments, courts have been sensitive to the difference between violations of extrinsic rules and violations of rules intrinsic to the grand jury's function. Objections to the admissibility of evidence, for example, have been distinguished from challenges to improprieties that occurred in constituting the grand jury. *Compare Costello v. United States,* 350 U.S. 359 (1956) (indictment may be based solely on hearsay), *with United States v. Fein,* 504 F.2d 1170 (2d Cir. 1974) (indictment dismissed where grand jury acted beyond its 18 month statutory life). The rationale for this differentiation is that some challenges to an indictment—such as presentation of hearsay or illegally seized evidence—can be cured at trial, whereas other improprieties corrupt the very core of the grand jury itself and therefore taint the indictment.

Not every rule, is, as the Government would have it, a procedural "technicality," whose breach is "harmless." Both the Government and Judge Wilkinson in the Court of Appeals' dissent (Pet. 24) fail to recognize that violations of certain rules of procedure can indeed have greater legal import than non-prejudicial deviations from constitutional norms. The legal theorist H. L. A. Hart has noted the distinction between "primary rules," which must be obeyed only generally, and "secondary rules," which are those that confer validity on the legal system itself. Hart, *The Concept of Law,* (Oxford U. Press 1961). The rule that a judge preside at a trial is such a validity-conferring rule. No one could reasonably argue for a showing of prejudice if a trial were conducted without a judge. Similarly Rule 6(d) confers validity on the grand jury

process. The Government is clearly wrong when it states that "[t]here is no 'strong policy' of enforcing Rule 6(d) . . . ." (Pet. 18) "To assert the validity of a rule is to predict that it will be enforced by courts or some other official action taken." Hart at 101. In the instant case the defect was intrinsic to the grand jury process itself and tainted that body's independence and integrity. The Court of Appeals properly enforced Rule 6(d).

The Government's Argument That Honoring An Accused's Sixth Amendment Right To Trial By Jury Vitiates His Fifth Amendment Right To Indictment By A Grand Jury Should Be Flatly Rejected

The Government argues (Pet. 15-19) that conviction by a petit jury should bar a defendant's challenge to a defective grand jury proceeding. An analogy is made to the inutility of challenging a denial of a summary judgment motion after final decision in a civil case. (Pet. 16) But a right to summary judgment is not mentioned in the Constitution. The Bill of Rights, on the other hand, expressly confers on citizens the right to indictment by grand jury. U.S. Const. Amend. V. Under the Government's analysis a conviction after trial vitiates this precious right.

The argument proves too much. A guilty verdict would do away with any need for an indictment at all since, according to the Government, a probable cause determination merges with the finding of guilt. Similarly, a defendant brought to trial on a sham indictment or an improperly amended indictment, or tried on an indictment returned by a single grand juror, would have no ground

for complaint. The argument collapses under its own weight and should be summarily rejected.

A Proper Exercise Of The District Court's Supervisory Powers Required A Dismissal Of The Indictment

There are three purposes underlying use of a court's supervisory power: "to implement a remedy for violation of recognized rights, . . . to preserve judicial integrity . . . and finally, as a remedy designed to deter illegal conduct." *United States v. Hasting,* 461 U.S. 499, 103 S.Ct. 1974, 1978-79 (1983). Dismissing an indictment for a flagrant breach of Rule 6(d) serves all three purposes.

First, a defendant has a recognized right to an indictment by an unbiased grand jury. *Costello v. United States,* 350 U.S. 359. He also is entitled to a grand jury which is not deprived by the prosecution of the opportunity to evaluate the credibility of witnesses. *United States v. Samango,* 607 F.2d 877, 884 (9th Cir. 1979); *see also Stirone v. United States,* 361 U.S. 212, 218-19 (1970).

When two DEA agents were permitted to testify in tandem before the grand jury, both of the above substantial rights were impaired. Not only did their mutually supportive testimony bolster each other's credibility—they alternated their testimony, referred to themselves as the collective "we," backed up each other in describing incriminating evidence and supplemented each other's presentation—but the presence of one may have inhibited the other from making any inconsistent statements or expressing any exculpatory evidence or dissenting sentiments. This is particularly so where, as here, one of the two witnesses was the other's superior.

Second, the indictment's dismissal in this case guarantees the integrity of the judicial process. Convictions cannot be permitted to stand where indictments are tainted. *United States v. Hogan,* 712 F.2d 757 (2d Cir. 1983) (presentation of unduly prejudicial hearsay evidence to grand jury required dismissal); *United States v. Serubo,* 604 F.2d 807 (3d Cir. 1979) (prosecutor's abuse of witnesses before grand jury required dismissal); *United States v. Basurto,* 497 F.2d 781 (9th Cir. 1974) (indictment dismissed where prosecutor presented perjured testimony to grand jury). The presiding spirit of those cases catalogued here indicates that, where there is a finding of prejudice caused by prosecutorial misconduct, the dismissal of an indictment is fully authorized under a court's supervisory powers or under the provisions of the Fifth Amendment.

Significantly, these cases do not stand for the broader proposition that the use of the supervisory power to dismiss an indictment is never proper in the absence of a showing of actual prejudice. Courts have never held that prejudice to the individual defendant is *required* in order to justify the exercise of a court's supervisory power. Federal courts, of course, have an institutional interest, independent of their concern for the rights of particular defendants, in preserving the appearance and reality of fair practice before grand juries.

Finally, dismissal of the indictment in this case will effectively deter such government misconduct in the future. At the very least this indictment *appears* tainted. Dismissing the indictment will not only dispel this indisputable appearance of impropriety, but will provide no-

tice to prosecutors that the rules governing the grand jury process, 6(d) as well as the others, are not to be given short shrift.* Thus the Court of Appeals properly and appropriately exercised its supervisory power when it dismissed this indictment.

The Impossibility Of Showing Prejudice

Assuming this Court were to adopt the Government's position and hold that a showing of prejudice is required before an indictment will be dismissed even for a deliberate, clearcut violation of Rule 6(d), the question remains as to how, if at all, a defendant may demonstrate such prejudice.

Since grand jury proceedings are secret, *ex parte* and largely under the control of federal prosecutors, requiring a defendant to show prejudice imposes an unreasonable, perhaps impossible, burden on him. In *United States v. Virginia Erection,* 335 F.2d 868, for example, the Fourth Circuit pointed out that even if an unauthorized juror in the jury room was silent, "his attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." 335 F.2d at 872.

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* It is no response that assistant United States attorneys in the Southern District of West Virginia now certify to the district court that the requirements of Rule 6(d) have been complied with. (Pet. 7) Should one of those certifications prove to be false or mistaken, dismissal of the indictment is the remedy. Thus the existence of the Government's present procedure does nothing to alter the issue. Alternately, if this procedure does assure that 6(d) violations will not occur in the future, then the petition for certiorari raises no substantial question and does not warrant this Court's review.

There seems to be only one mechanism available that could possibly unearth this and other types of prejudice occurring in the grand jury room: a hearing in which counsel can examine the grand jurors themselves. We realize that this procedure would require, as the Second Circuit characterized it, "peering into the grand jurors' minds," a prospect which that court called "both impractical and unpalatable." *United States v. Hinton,* 543 F.2d 1002, 1010 (2d Cir. 1976).

Yet it would be patently unfair to require a defendant to demonstrate that the grand jury was prejudiced, and at the same time deprive him of the means of proof. Unless the Court is prepared to authorize such hearings, *cf. Remmer v. United States,* 347 U.S. 227 (1954), the Government's call for a showing of prejudice must be rejected.

The Only Appropriate Remedy Under The Particular Facts Of This Case Was Dismissal

The Government, citing the injunction in *United States v. Morrison,* 449 U.S. 361, 364 (1981), that "remedies should be tailored to the injury suffered from the constitutional violation," argues (Pet. 14-15) that remedies other than "the most drastic remedy" of dismissal are available. *Morrison* simply stands for the proposition that where federal agents violate a defendant's Sixth Amendment right to counsel the appropriate remedy is suppression of the evidence—or reversal if the evidence was admitted at trial—but not dismissal of the indictment. 449 U.S. at 365. The same applies to evidence obtained in violation of the Fourth and Fifth Amendments. 449 U.S.

at 365-66. This unexceptional result is nothing more than an application of the principle established in *Costello v. United States,* discussed earlier, that evidentiary challenges to indictments will not be entertained, since any such defects can be cured prior to or at trial. In our case, of course, suppression or mere reversal is not available.

We agree with the already-noted concession of the Government (Pet. 14 n. 9) that "the most specific and tailored remedy would be to require the Government to correct the error—that is, to present its case anew to a grand jury in compliance with Rule 6(d)" when the breach is addressed and remedied before trial. But it was the Government itself that blocked this appropriate remedy when the case was in that stance! The violation was never remedied until the case was in the appeal posture, when no less drastic remedy than reversal of the conviction and dismissal of the indictment was available to the Court of Appeals.* Thus the court properly "neutral-

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* The Government suggests (Pet. 14) that a suitable remedy would be to discipline or publicly chastise the prosecutor or punish him for contempt. But these remedies are not appropriate. Although the prosecutor deliberately, that is, intentionally, called the two agents before the grand jury, there is no proof that he did so wilfully. Therefore punishment of the prosecutor is not warranted for a breach of Rule 6(d) standing alone.

A study conducted by Professor Albert Alschuler is also worth noting. He surveyed reported decisions for a period of 25 years and did not find a single case in which a prosecutor had been punished for contemptuous courtroom behavior, although he found a large number in which defense counsel had been so disciplined. Professor Alschuler's research also revealed that

(Continued on following page)

ize[d] the taint by tailoring relief appropriate in the circumstances." *Morrison,* 449 U.S. at 365.

CONCLUSION

The Government's petition for a writ of certiorari should be denied.

Dated: New York, New York
May 14, 1985

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(Continued from previous page)

professional disciplinary procedures are virtually never invoked as a corrective for courtroom misconduct by prosecutors. He was unable to find a more recent instance of such a disciplinary procedure than a 1908 case against a Nevada prosecutor. Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges,* 4 Tex. L. Rev. 629, 671, 674 (1972).

OPPOSITION

BRIEF

Office-Supreme Court, U.S.
FILED
MAY 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1640

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHALL MECHANIK, ET. AL.

RESPONSE OF RESPONDENT MARSHALL MECHANIK TO THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER

v.

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RESPONSE OF RESPONDENT MARSHALL MECHANIK TO THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI

In response to the Government's Petition for Certiorari, Marshall Mechanik states that this Court should grant both his and the Government's Petitions, so that the full spectrum of issues in the underlying case will be briefed and decided.

Respectfully submitted,

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Attorney for Marshall
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May, 1985

REPLY BRIEF

(3)

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No. 84-1640

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE UNITED STATES

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1. Since filing the petition for certiorari in this case, this Office has become aware that two of the four individuals listed as respondents in our petition have been reindicted on charges essentially the same as those in the indictment dismissed by the court of appeals and have pleaded guilty either to those charges (respondent Riddle) or to an indictment brought in another jurisdiction pursuant to an agreement disposing of those charges (respondent Zarintash).[1] Accordingly, the proceeding against respondents Riddle and Zarintash is moot, and they should no longer be considered respondents in this case. The case against the remaining respondents, Mechanik and Lill, remains a live controversy.

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[1]Respondent Zarintash pleaded guilty on April 2, 1985, to unrelated charges of narcotics violations in the District of New Jersey. The plea agreement provided that the government would dismiss numerous other federal charges against Zarintash, including those involved here.

2. Other than noting that the proceeding against respondents Zarintash and Riddle has become moot, the brief in opposition filed by respondent Zarintash contains little that detracts from the certworthiness of this case. The brief is largely an argument on the merits. The supposed "unbroken series of cases extending over a long stretch of our judicial history" supporting respondent's position (Br. in Opp. 11) were discussed in our petition (at 20 n.13). Even apart from the fact that such decisions are in tension with rulings of this Court (*e.g., Costello* v. *United States,* 350 U.S. 359 (1956)), most are district court cases in which the government found it easier and more expeditious to reindict rather than to appeal.[2] Here, however, the district court denied the defendants' motion to dismiss, and the consequence of the court of appeals' order of dismissal is to reverse the results of a three month trial.[3] The issues raised by the decision below are of considerable importance to the administration of justice, as respondent Zarintash does not deny. They should be resolved by this Court.

3. Respondents Mechanik and Lill have filed separate petitions for certiorari in Nos. 84-1700 and 84-1704, raising issues under Fed. R. Crim. P. 6(d) related to those in our petition. Their petitions provide further corroboration of

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[2]*Latham* v. *United States,* 226 F. 420 (5th Cir. 1915), is the only federal appellate case cited by respondent Zarintash (Br. in Opp. 12-13 n.*). As noted in our petition (at 21) the Rule 6(d) holding in *Latham* was an alternative holding.

[3]Respondent Zarintash belittles (Br. in Opp. 13) the conflict with *United States* v. *Condo,* 741 F.2d 238 (9th Cir. 1984), cert. denied, No. 84-5793 (Jan. 14, 1985); *United States* v. *Kahan & Lessin Co.,* 695 F.2d 1122 (9th Cir. 1982); and *United States* v. *Rath,* 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969), on the ground that the violations of Rule 6(d) in those cases were less "egregious" than that here. However, the question is whether dismissal of an indictment (and reversal of a conviction) is mandated as a per se matter. The court below held that it is; the other decisions cited held that it is not.

the need for this Court's review of these issues. We have filed a brief in those cases supporting the petitions, limited to the issue of the remedy for the violation of Rule 6(d). As of this writing, respondents Mechanik and Lill have not filed briefs in response to our petition. However, we have discussed the three related petitions with counsel for respondents Mechanik and Lill, and are authorized to state that respondent Mechanik acquiesces in our petition, on the condition that his own petition on the Rule 6(d) issue is granted. Counsel for respondent Lill will be filing a brief in response to our petition within a few days.

For these reasons, and those stated in our petition, the petition for a writ of certiorari should be granted as to respondents Mechanik and Lill.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1985

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OPPOSITION

BRIEF

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No. 84-1640 (5)

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UNITED STATES OF AMERICA, PETITIONER

v.

MARSHALL MECHANIK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT JEROME OTTO LILL

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QUESTIONS PRESENTED IN GOVERNMENT'S PETITION

1. Whether a facially valid indictment returned by a legally constituted and unbiased grand jury may be dismissed on the basis of a procedural irregularity in the grand jury proceeding.

2. If so, whether the indictment may be dismissed and a conviction reversed on the basis of such irregularity after an otherwise valid conviction has been entered by a petit jury.

3. Whether reversal of the conviction and dismissal of the indictment is an appropriate remedy in the absence of prejudice to the defendant resulting from the procedural irregularity in the grand jury proceeding.

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No. 84-1640

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BRIEF FOR RESPONDENT JEROME OTTO LILL

ARGUMENT

The respondent herein, Jerome Otto Lill, has also petitioned this Court for a writ of certiorari in

case number 84-1700. This brief is filed in opposition to the government's petition to the extent that the questions presented by the government go well beyond the issues that must be resolved in a review of the Fourth Circuit Court of Appeals' decision in this case.

I. THERE IS NO CONFLICT WITH OTHER DECISIONS OF ANY COURT OF APPEALS REGARDING COUNT ONE IN THAT THE COURT OF APPEALS CORRECTLY APPLIED CASE PRECEDENT IN REVERSING THE RESPONDENT'S CONSPIRACY CONVICTION

The Court of Appeals' analysis and application of the remedy of dismissal of Count One in this case, based upon a flagrant violation of Federal Rule of Criminal Procedure 6(d), was correct and consistent with all the case law precedent in the federal circuits and district courts which have considered this issue. United States v. Fulmer, 722 F.2d 1192 (5th Cir. 1983); Latham v. United States, 226 F. 420 (5th Cir. 1915); United States v. Echols, 542 F.2d 948 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977); United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okl. 1977); United States v. Borys, 169 F. Supp. 366 (D.

Alaska 1959); United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978); United States v. Branniff Airways, Inc., 428 F. Supp. 578 (W. D. Tex 1977); United States v. Bowdach, 324 F. Supp. 123 (S.D. Fla. 1971); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); United States v. Edgerton, 80 F. 374 (D. Mont. 1877).

Regarding the conspiracy count, the cases cited by the government in support of their argument that this Court must resolve a conflict in the circuits (84-1640 Pet 20 and 21), do not demonstrate the alleged conflict in the circuits. In United States v. Condo, 741 F. 2d 238 (9th Cir. 1984), cert. denied, No. 84-5793 (Jan. 14, 1985), the court stated that:

> The district judge's refusal to dismiss for prosecutorial misconduct was not an abuse of discretion. There was no reversible error because of the unauthorized persons present in the grand jury room. The case agent was there to aid the grand jury in handling bulky documents, his presence was fleeting, and only error was harmless. 741 F.2d at 239. (Emphasis Added)

In United States v. Kahan & Lessin Co., 695 F.2d 1122 (9th Cir. 1982), the court stated that:

> . . . We hold that when there were no proceedings during the inadvertent intrusions into the grand jury room, dismissal is not warranted. 695 F.2d at 1124.

In United States v. Kazonis, 391 F.Supp. 804 (D. Mass. 1975), aff'd mem., 530 F.2d 962 (1st Cir.), the defendant challenged the unauthorized presence of a special prosecutor, appointed by the Assistant Attorney General, who presented the case to the grand jury. In Kazonis, the court stated that:

> It is an accepted principle of criminal law that the presence of an "unauthorized person" before a grand jury void an indictment. Historically the prohibition against "unauthorized persons" has not focused on the prosecuting attorney at all . . . The tradition of the common law thus accomodated the presence in the grand jury of any lawyer chosen by the individual prosecutor for the purpose of presenting the evidence, without regard to his particular commission or authority. The presence of the Special Attorney is clearly no violation of a fundamental rule but is in accord with an ancient tradition. 391 F.Supp. at 805, 806.

Finally, in United States v. Rath, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969), the court stated that:

> . . . A stranger to this action unintentionally interrupted the grand jury proceedings by entering the courtroom in

> which they were being conducted. The record establishes that the proceedings were halted at the moment of his entrance, and were not resumed during the fifteen to twenty second period of his presence. We held that the interruption did not invalidate the proceedings or the indictment. 406 F.2d at 757.

None of the above cases cited by the government involved actual flagrant Rule 6(d) violations. Where, as in this case, there is an established actual flagrant Rule 6(d) violation, there is no conflict among the circuits as to the remedy of dismissal.

The Fourth Circuits error, which created conflict in the circuits, involved the affirmance of the respondent's convictions on counts two and four of the indictment. To the extent that review of that error requires argument and consideration of the issues raised by the questions presented by the government, the respondent herein has no objection to the Court's consideration of those issues. However, the Fourth Circuit's holding as to count one, considered alone, is insufficient to merit this Court's granting of the government's petition.

CONCLUSION

The government's petition for a writ of certiorari to review the reversal of the conviction on count one for the Rule 6(d) violation should be denied.

Respectfully submitted,

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JOINT

APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARSHALL MECHANIK, Petitioner
v
UNITED STATES OF AMERICA, Respondent

JEROME OTTO LILL, Petitioner
v
UNITED STATES OF AMERICA, Respondent

UNITED STATES OF AMERICA, Petitioner
v
MARSHALL MECHANIK, ET AL, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

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Attorneys for Jerome Otto Lill

PETITIONS FOR CERTIORARI FILED April 29, 1985
April 30, 1985 and April 17, 1985
CERTIORARI GRANTED JUNE 17, 1985

BEST AVAILABLE COPY

JOINT APPENDIX TABLE OF CONTENTS

Every item appearing in this Joint Appendix involved the United States District Court for the Southern District of West Virginia.

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Relevant Docket Entries — Jerome Otto Lill

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U.S. vs.

LILL, JEROME OTTO

79 20056 03
Yr. Docket No. Def.

Date	Proceedings (Document No.)	V. Excludable Delay
8-10-79 (1)	FILED, INDICTMENT	
8-13-79 (2)	Filed, Govt.'s notice of motion and motion for consolidation of this case and 79-20045.	
8-17-79 (3)	ORDER, consolidating this case and 79-20045 for purpose of trial; deft.'s pretrial motions due by 8-24-79; Govt. to respond by 8-31-79.	
8-17-79 (4)	ARRAIGNMENT ORDER; def. stood mute and Court entered plea of NOT GUILTY to Counts 1, 2, 3, and 4 of the within 12-count indictment; case set for trial on 9-24-79; deft.'s motions due by 8-24-79; Govt. to respond by 8-31-79; motions for transfer pursuant to Rule 21(b) FRCrP must be filed within 10 days from this date; hearing on pre-trial motions set for 9-4-79 at 9:30 a.m.; deft.'s bond heretofore executed in 79-20045-03 in the amount of $125,000.00 on 7-16-	

79 shall continue from the 79-20045-03 case; deft. and counsel agreed that the stipulation order re: discovery materials which was filed in 79-20045-03 shall continue; deft. to advise Govt. in writing by 8-24-79 of which of the pretrial motions filed in 79-20045-03 he wishes to adopt in this case.

Date	Proceedings (Document No.)	V. Excludable Delay
8-28-79 (6)	Filed, Defendant's motion to join in motions of other defend ants; reaffirms all motions heretofore made for deft.; proposed order to adopt and join in motions of other defendants attached.	2-8-28-79 E 8-30-79
8-30-79 (8)	Filed, Government's responses to similar pretrial motions of the defendants.	
3-60-80 (28)	Filed, defendant's motin for dismissal.	
3-14-80 (34)	ORDER, denying defendant's motion to dismiss indictment on grounds of alleged violation of Rule 6(d) FRCrP; denying defendant's motion for a stay of trial.	
4-4-80 (41)	ORDER, Grand Jury transcripts to be filed and sealed with Clerk.	
4-4-80	See CR 79-20045-03 for sealed grand jury transcripts.	

4-4-80	Mailed record on appeal to Court of Appeals (Appeal No. 80-5039)	
4-29-80 (49)	ORDER, case assigned to Judge Copenhaver; trial to continue on 5-12-80 at 9:30 a.m.	
5-22-80 (63)	Filed, Deft.'s notice of motion for rehearing.	
7-7-80 (73)	ORDER; case on trial on Feb. 19-22, March 5-7, March 10-14, March 20 and 21, March 24-28, April 7-11, April 17, April 23-25, May 21-23, May 27-30, June 2-4, June 6; June 9-12, June 17-21, and June 23-27, 1980; jury returned a verdict of GUILTY as to Counts 1, 2, and 4; adjudged that deft. is guilty and stands convicted; Probation Dept. to make PSI and report to the Court thereon; deft. to be sentenced on 8-6-80 at 1:00 p.m.; denying Govt.'s motion to revoke deft.'s bond pending sentencing; bond shall continue.	
6-27-80 (74)	Filed, jury verdict of GUILTY as to Counts 1, 2 and 4 of this indictment.	
8-15-80 (81)	MEMORANDUM ORDER; denying deft.'s motions to dismiss indictment by reason of the Rule 6(d) violation.	
8-15-80 (82)	JUDGMENT ORDER from proceedings on 8-6-80; deft. committed for 5 yrs impr plus a special parole term of 2 years as to each of Counts 2 and 4; As	

to Count 1, deft imprisoned for 5 years; to run concurrently for a TOTAL COMMITMENT PERIOD of 5 years and a TOTAL SPECIAL PAROLE TERM of 2 years; Deft. is fined $10,000.00 as to each of Counts 1, 2 and 4, said fines to be inclusive of one another for an aggregate fine of $10,000.00

Relevant Docket Entries — Marshall Mechanik

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U.S. vs.

MECHANIK, MARSHALL
a/k/a Michael Patrick Flanagan

79 20056 11
Yr. Docket No. Def.

Date	Proceedings (Document No.)	V. Excludable Delay
8-10-79 (1)	FILED, INDICTMENT	
8-13-79 (2)	Filed, Government's notice of motion and motion for consolidation of this case and 79-20045.	
8-13-79 (3)	ORDER, consolidating this case and 79-20045 for purpose of trial; deft.'s pretrial motions due by 8-24-79; Govt. to respond by 8-31-79.	
8-17-79 (4)	ARRAIGNMENT ORDER; def. entered plea of NOT GUILTY to Counts 1 and 10 of the within indictment; case set for trial on 9-24-79; deft.'s pretrial motions due by 8-24-79; Govt. to respond by 8-31-79; motions for transfer pursuant to Rule 21(b) FRCrP must be filed within 10 days from this date; hearing on pretrial motions shall be 9-4-79 at 9:30 a.m.; bond heretofore executed on 6-20-79 in the amount	

of $175,000.00 in 79-20045-07 shall continue in this case; deft. and counsel agreed that waiver of right to be present at pretrial hearings filed in 79-20045-07 shall continue in this case; deft. and counsel agreed that stipulation/order re: discovery materials filed in 79-20045-07 shall continue in this case; deft. to advise Govt. in writing by 8-24-79 of which of the pretrial motions filed in 79-20045-07 he wishes to adopt in this case.

Date	Proceedings (Document No.)	V. Excludable Delay
8-30-79	(6) Filed, Government's responses to similar pretrial motions of the defendants.	
2-13-80	(20) Filed, Deft.'s notice of motion for an Order requiring the Govt. to disclose the testimony of DEA Agent Randy James before the Grand Jury in support of either the first or superceding indictment.	
2-13-80	(22) Filed, Deft.'s notice of motion for on Order requiring the Govt. to provide defts. with all of the Grand Jury testimony.	
3-6-80	(26) Filed, Defendant's motion for dismissal.	
3-14-80	(28) ORDER, denying deft.'s motion to dismiss indictment on grounds of alleged violation of Rule 6(d) FRCrP; denying deft.'s motion for a stay of trial.	

4-4-80	(35) ORDER; Grand Jury transcripts to be filed and sealed with Clerk.	
4-4-80	See CR 79-20045-03 for grand jury transcripts. (Sealed)	
	Mailed record on appeal to 4th Circuit (Appeal No. 80-5039)	
4-29-80	(41) ORDER, case assigned to Judge Copenhaver; trial to continue to 5-12-80 at 9:30 a.m.	
4-29-80	CASE ASSIGNED TO JUDGE COPENHAVER.	
5-22-80	(54) Filed, Deft.'s notice of motion for rehearing.	
7-7-80	(60) ORDER; case on trial on Feb. 19-22, March 5-7, March 10-14, March 20 and 21, March 24-28, April 7-11, April 17, April 23-25, aaMay 21-23, May 27-30, June 2-4, June 6; June 9-12, June 17-21, and June 23-27, 1980; jury returned a verdict of GUILTY as to Counts 1 and 10 of this indictment; adjudged that deft. is guilty and stands convicted; Probation Dept. to make PSI and report to the Court thereon; deft. to be sentenced on 8-6-80 at 2:00 p.m.; denying Govt.'s motion for revoking deft.'s bond pending sentencing; bond to continue.	
6-27-80	(61) Filed, jury verdict of GUILTY as to Counts 1 and 10 of indictment.	

8-15-80 (73) MEMORANDUM ORDER; denying deft.'s motions to dismiss indictment by reason of the Rule 6(d) violation.

8-15-80 (74) JUDGMENT ORDER, (from proceedings on 8-6-80); deft. committed for 5 years impr. as to each of Counts 1 to 10, to run concurrently for a TOTAL COMMITMENT PERIOD OF 5 YEARS; deft. fined $10,000.00 as to each of Counts 1 and 10, said fines to be inclusive of one another for an aggregate fine of $10,000.00

Indictment

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
JUNE 12, 1979 SESSION, GRAND JURY NO. TWO
CHARLESTON

UNITED STATES OF AMERICA

v.

BRECK DANA ANDERSON
DAVID THOMAS SEESING
JEROME OTTO LILL
GREGORY LOUIS MCCAFFERTY
MARK DOUGLAS CHADWICK
SHAHBAZ SHANE ZARINTASH
MARSHALL MECHANIK
also known as
Michael Patrick Flanagan
LEON JACQUES GAST
STEVEN HENRY RIDDLE

CRIMINAL NO. 79-20045
18 U.S.C. § 371
21 U.S.C. § 952(a)
21 U.S.C. § 841(a)(1)
18 U.S.C. § 1952(a)(3)
18 U.S.C. § 2

The Grand Jury Charges:

FIRST COUNT

1. That for an unknown period of time up to and including the 6th day of June, 1979, at Charleston, Kanawha County, West Virginia, and within the Southern Distsrict of West Virginia, and elsewhere, BRECK DANA ANDERSON, DAVID THOMAS SEESING, JEROME OTTO LILL, GREGORY LOUIS MCCAFFERTY, MARK DOUGLAS CHADWICK, SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, LEON JACQUES GAST and

STEVEN HENRY RIDDLE, the defendants, did wilfully and knowingly combine, conspire, confederate and agree together and with each other and with divers other persons, whose names are to the grand jury unknown, to commit offenses against the United States, that is:

a. To unlawfully, knowingly, intentionally and without authority possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1);

b. To travel in interstate and foreign commerce with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving a controlled substance, in violation of Title 18, United States Code, Section 1952(a)(3);

c. To import into the customs territory of the United States from a place outside thereof a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a); and

d. To corruptly influence, obstruct and impede, and endeavor to influence, obstruct and impede the due administration of justice, in violation of Title 18, United States Code, Section 1503.

2. It was part of this conspiracy that defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, JEROME OTTO LILL, and GREGORY LOUIS MCCAFFERTY would and did travel in interstate and foreign commerce, via a DC-6 aircraft, from points outside the United States to a point within the United States, that is, Charleston, Kanawha County, West Virginia, by following a flight plan that included San Marcos in Guatemala, Kingston in Jamaica, Inagua in the Bahama Islands, Fayetteville and Greensboro in the State of North Carolina, and Pulaski in the State of Virginia.

3. It was further part of this conspiracy that the aforesaid DC-6 aircraft would and did carry as contraband cargo approximately 20,000 pounds of marihuana, a Schedule I non-narcotic controlled substance.

4. It was further part of this conspiracy that at approximately 12:53 a.m. on the 6th day of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, JEROME OTTO LILL and GREGORY LOUIS MCCAFFERTY would and did land and attempt to land the aforesaid DC-6 aircraft at the Kanawha County Airport near Charleston, West Virginia.

5. It was further part of this conspiracy that defendants SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, LEON JACQUES GAST and STEVEN HENRY RIDDLE would and did travel in interstate commerce from points outside the State of West Virginia to the Kanawha County Airport near Charleston, West Virginia, with intent to meet the aforesaid DC-6 aircraft and receive the contraband cargo which it carried.

6. It was futher part of this conspiracy that defendant MARK DOUGLAS CHADWICK, acting under color of his office as deputy sheriff of Kanawha County, would and did arrange with his close friend, defendant SHAHBAZ SHANE ZARINTASH, to provide a safe and secure place to land the aforesaid DC-6 aircraft at the Kanawha County Airport near Charleston, West Virginia.

7. It was further part of this conspiracy that defendants MARK DOUGLAS CHADWICK, SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, LEON JACQUES GAST and STEVEN HENRY RIDDLE would be and were at the Kanawha County Airport near Charleston, West Virginia, in the early morning hours of the 6th of June, 1979, to meet the aforesaid DC-6 aircraft and receive the contraband cargo which it carried.

8. It was further part of this conspiracy that, after the aforesaid DC-6 aircraft attempted to land and crashed, defendant MARK DOUGLAS CHADWICK would and did aid and assist the flight of defendants SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, LEON JACQUES GAST, STEVEN HENRY RIDDLE and unknown others, who were riding in two Ryder rental trucks from the premises of the Kanawha County airport.

OVERT ACTS

9. In order to further the objects and purposes of the aforesaid conspiracy, the defendants and coconspirators did commit the following and other overt acts:

a. On or about the 4th day of June, 1979, defendant MARSHALL MECHANIK, also known as Michael Flanagan, rented a Ryder rental truck near Spartanburg, South Carolina;

b. On the 5th and 6th days of June, 1979, defendants BRECK DANA ANDERSON and DAVID THOMAS SEESING piloted the aforesaid DC-6 aircraft, containing defendants JEROME OTTO LILL and GREGORY LOUIS MCCAFFERTY and approximately ten tons of marihuana, from outside the United States to the Kanawha County Airport;

c. At approximately 12:30 a.m. on June 6, 1979, defendant MARK DOUGLAS CHADWICK traveled to the Eagle Aviation terminal at Kanawha County Airport

d. At approximately 12:30 a.m. on June 6, 1979, defendants SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, LEON JACQUES GAST, STEVEN HENRY RIDDLE and unknown others traveled to the General Aviation Area of the Kanawha County Airport in two Ryder rental trucks to meet the aforesaid DC-6 aircraft nad receive its contraband cargo;

e. At approximately 12:40 a.m. on June 6, 1979, defendant MARK DOUGLAS CHADWICK had a conversation with defendant SHAHBAZ SHANE ZARINTASH;

f. On June 6, 1979, at the General Aviation Area of the Kanawha County Airport, defendant SHAHBAZ SHANE ZARINTASH possessed and utilized radio equipment for the purpose of communicating from the ground to airborne aircraft;

g. On June 6, 1979, at Kanawha County Airport, defendant MARK DOUGLAS CHADWICK possessed a hand-held communication unit or scanner;

h. At approximately 12:50 a.m. on June 6, 1979, defendants BRECK DANA ANDERSON and DAVID THOMAS SEESING requested the control tower at Kanawha County Airport to provide landing instructions to the aforesaid DC-6 aircraft;

i. At approximately 12:53 a.m. on June 6, 1979, the aforesaid DC-6 aircraft attempted to land at Kanawha County Airport;

j. At approximately 1:05 a.m. on June 6, 1979, defendant MARK DOUGLAS CHADWICK advised the defendants and unknown others in the aforesaid Ryder rental trucks that their plane had crashed and that their cargo was all over the hillside;

k. At approximately 1:05 a.m. on June 6, 1979, defendant MARK DOUGLAS CHADWICK aided the flight of the defendants and unknown others in the aforesaid Ryder rental trucks from the premises of the Kanawha County Airport;

l. At approximately 1:10 a.m. on June 6, 1979, defendant MARK DOUGLAS CHADWICK falsely advised the Kanawha County Sheriff's Department and its personnel that he was on Greenbrier street and proceeding to the airport when in fact he was then present at the Kanawha County Airport;

m. From approximately 12:53 a.m. until approximately 2:07 a.m. on June 6, 1979, defendant MARK DOUGLAS CHADWICK intentionally withheld from law enforcement authorities his knowledge of the presence and flight of the two Ryder rental trucks and their occupants from the Kanawha County Airport;

n. At approximately 2:07 a.m. on June 6, 1979, defendant MARK DOUGLAS CHADWICK falsely

advised the Kanawha County Sheriff's Department and its representatives that he had observed one Ryder truck containing one white male; and

o. Other overt acts.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371.

SECOND COUNT

On or about the 6th day of June, 1979, at the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, JEROME OTTO LILL and GREGORY LOUIS MCCAFFERTY, aided and abetted by each other, did unlawfully import into the United States from a place outside thereof approximately 20,000 pounds of marihuana, a Schedule I non-narcotic controlled substance as defined in Title 21, Code of Federal Regulations, Section 1308.11(d)(13); in violation of Title 21, United States Code, section 952(a) and Title 18, United States Code, Section 2.

THIRD COUNT

On or about the 5th and 6th days of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, JEROME OTTO LILL, and GREGORY LOUIS MCCAFFERTY, aided and abetted by each other, did travel in interstate and foreign commerce from points outside the State of West Virginia and the United States of America to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion management, establishment and carrying on of an unlawful activity,

that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

FOURTH COUNT

On or about the 6th day of June, 1979, at Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, JEROME OTTO LILL and GREGORY LOUIS MCCAFFERTY, aided and abetted by each other, did unlawfully, knowingly, intentionally and without authority possess with intent to distribute a controlled substance, that is, approximately 20,000 pounds of marihuana, a Schedule I non-narcotic controlled substance as defined by Title 21, Code of Federal Regulations, Section 1308.11(d)(13); in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

FIFTH COUNT

On or before the 5th day of June, 1979, defendant SHAHBAZ SHANE ZARINTASH did travel in interstate commerce from points outside the State of West Virginia, including New York City, New York, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

SIXTH COUNT

On or about the 4th day of June, 1979, defendant MARSHALL MECHANIK, also known as Michael Patrick Flanagan, did travel in interstate commerce from at or near Spartanburg, South Carolina, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

SEVENTH COUNT

On or before the 5th day of June, 1979, defendant LEON JACQUES GAST did travel in interstate commerce from points outside the State of West Virginia, including New York City, New York, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

EIGHTH COUNT

On or before the 5th day of June, 1979, defendant STEVEN HENRY RIDDLE did travel in interstate commerce from points outside the State of West Virginia,

including Taylorsville, Kentucky, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

A True Bill.

Foreman

ROBERT B. KING
United States Attorney

Superseding Indictment

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AUGUST 9, 1979 SESSION, GRAND JURY NO. TWO
CHARLESTON

UNITED STATES OF AMERICA

v.

BRECK DANA ANDERSON
DAVID THOMAS SEESING
JEROME OTTO LILL
MARK DOUGLAS CHADWICK
JAMES F. CHADWICK
CRAIG BRUCE MGGILVRAY
RUSSELL KOOK, also known
as Russell cook
GREGORY LOUIS MCCAFFERTY
also known as Greg Jack and as
George T. Markos
SHAHBAZ SHANE ZARINTASH
LEON JACQUES GST
MARSHALL MECHANIK, also known as
Michael Patrick Flanagan
STEVEN HENRY RIDDLE

Criminal No. 79-20056-01
18 U.S.C. § 371 - Ct. 1
21 U.S.C. § 952(a) and
18 U.S.C. § 2 - Ct. 2
18 U.S.C. §§ 1952(a)(3)
and 2 - Ct. 3
21 U.S.C. § 841(a)(1) and
18 U.S.C. § 2 - Ct. 4
21 U.S.C. § 843(b) - Ct. 5
18 U.S.C. § 1952(a)(3) -
Cts. 6, 7, 8, 9, 10, 11 and 12

The Grand Jury Charges:

FIRST COUNT

1. That for an unknown period of time up to and including the 6th day of June, 1979, at Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, and elsewhere, BRECK DANA ANDERSON, DAVID THOMAS SEESING, JEROME OTTO LILL, MARK DOUGLAS CHADWICK, JAMES F. CHADWICK, CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, also known as Russell Cook, GREGORY LOUIS MCCAFFERTY, also known as Greg Jack and as George T. Markos, SHAHBAZ SHANE ZARINTASH, LEON JACQUES GAST, MARSHLAL MECHANIK, also known as Michael Patrick Flanagan, and STEVEN HENRY RIDDLE, the defendants, did wilfully and knowingly combine, conspire, confederate and agree together and with each other and with divers other persons, whose names are to the grand jury unknown, to commit offenses against the United States, that is:

a. To unlawfully, knowingly, intentionally and without authority possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1);

b. To travel in interstate and foreign commerce with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving a controlled substance, in violation of Title 18, United States Code, Section 1952(a)(3);

c. To import into the customs territory of the United States from a place outside thereof a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a); and

d. To use a commuinication facility, that is, the telephone, in committing, causing and facilitating the commission of acts constituting felonies under the provisions of subschapters I and II of Title 21, United States Code, in violation of Title 21, United States Code, Section 843(b).

2. It was a part of this conspiracy that the defendants and co-conspirators would and did use communication facilities, that is, telephones, in interstate and foreign commerce between various points within and without the United States of America, including but not limited to New York City and other points in the State of New York; Boca Raton, Daytona Beach, Hollywood, Miami and Sarasota in the State of Florida; Parma and Cleveland in the State of Ohio; Madison in the State of Wisconsin; Spartanburg in the State of South Carolina; Waco in the State of Texas; and Belle, Charleston, Parkersburg and Ripley in the State of West Virginia, in committing, causing and facilitating the commission of violations of hte Drug Control statutes of the United States.

3. It was further part of this consparacy that defendants MARK DOUGLAS CHADWICK and JAMES F. CHADWICK, acting under color of their office, that is, each being a Deputy Sheriff of Kanawha County, would and did arrange with their close friend, defendant SHAHBAZ SHANE ZARINTASH, to do the following:

(a) Provide a safe and secure place to land a DC-6 aircraft carrying a contraband cargo at the Kanawha county Airport near Charleston, West Virginia;

(b) Provide a safe and secure place for the aforesaid DC-6 aircraft to be unloaded at the Kanawha County Airport near Charleston, West Virginia; and

(c) Provide the defendants and co-conspirators with a safe departure from the airport.

4. It was part of this conspiracy that defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL would travel in interstate and foreign commerce, via a DC-6 aircraft, from points outside the United States to a point within the United states, that is, Charleston, Kanawha County, West Virginia, by following a flight plan that included

San Marcos in Columbia, South America; Kingston in Jamaica; Inagua in the Bahama Islands; Fayetteville and Greensboro in the State of North Carolina; and Pulaski in the State of Virginia.

5. It was further part of this conspiracy that the aforesaid DC-6 aircrart would carry as contrabar.d cargo approximately 20,000 pounds (ten tons) of marihuana, a Schedule I non-narcotic controlled substance.

6. It was further part of this conspiracy that during the early morning hours of the 6th day of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL would land the aforesaid DC-6 aircraft at the Kanawha County Airport near Charleston, West Virginia.

7. It was further part of this conspiracy that defendants CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, also known as Russell Cook, GREGORY LOUIS MCCAFFERTY, also known as Greg Jack and as George T. Markos, SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, LEON JACQUES GAST, STEVEN HENRY RIDDLE and others unknown to the grand jury, would travel in interstate commerce from points outside the State of West Virginia to the Kanawha County Airport near Charleston, West Virginia, with intent to meet the aforesaid DC-6 aircraft and receive the aforesaid contraband cargo which it carried.

8. It was further part of this conspiracy that defendants MARK DOUGLAS CHADWICK, CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, also known as Russell Cook, GREGORY LOUIS MCCAFFERTY, also known as Greg Jack and as George T. Markos, SHAHBAZ SHANE ZARINTASH, LEON JACQUES GAST, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, and STEVEN HENRY RIDDLE would be at the Kanawha County Airport near Charleston, West Virginia, in the early morning hours of

the 6th day of June, 1979, to meet the aforesaid DC-6 aircraft and receive the contraband cargo which it carried.

OVERT ACTS

9. In order to further the objects and purposes of the aforesaid conspiracy, the defendants and co-conspirators did commit the following and other overt acts:

a. On or about the 19th day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Cleveland, Ohio.

b. On or about the 19th day of April, 1979, a phone call was made from Daytona Beach, Florida, to Cleveland, Ohio.

c. On or about the 20th day of April, 1979, defendant GREGORY LOUIS MCCAFFERTY, using the name George T. Markos, rented a Ryder truck in Cleveland, Ohio.

d. On or about the 21st of April, 1979, defendant MARSHALL MECHANIK, using the name Michael Patrick Flanagan, rented a Ryder rental truck in Charleston, West Virginia.

e. On or about the 23rd day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Daytona Beach, Florida.

f. On or about the 24th day of April, 1979, defendant LEON JACQUES GAST received a phone call.

g. On or about the 26th day of April, 1979, defendant DAVID THOMAS SEESING received a phone call.

h. On or about the 27th day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Clevelnd, Ohio.

i. On or about the 27th day of April, 1979, defendant DAVID THOMAS SEESING received a phone call.

j. On or about the 28th day of April, 1979, a phone call was made from Cleveland, Ohio, to Hollywood Beach, Florida.

k. On or about the 28th day of April, 1979, defendant MARSHALL MECHANIK, using the name Michael Patrick Flanagan, rented a Ryder rental truck in Charleston, West Virginia.

l. On or about the 28th day of April, 1979, defendant GREGORY LOUIS MCCAFFERTY, using the name George T. Markos, rented a Ryder truck in Cleveland, Ohio.

m. On or about the 29th day of April, 1979, a phone call was made from Daytona Beach, Florida, to Hollywood Beach, Florida.

n. On or about the 3rd day of May, 1979, a phone call was made from Daytona Beach, Florida, to Waco, Texas.

o. On or about the 3rd day of May, 1979, a phone call was made from Daytona Beach, Florida, to Cleveland, Ohio.

p. On or about the 5th day of May, 1979, a phone call was made by defendant LEON JACQUES GAST to Hollywood Beach, Florida.

q. On or about the 5th day of May, 1979, defendant GREGORY LOUIS MCCAFFERTY, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

r. On or about the 5th day of May, 1979, defendant MARSHALL MECHANIK, using the name Michael P. Flanagan, traveled to Charleston, West Virginia.

s. On or about the 7th day of May, 1979, defendant LEON JACQUES GAST received a phone call from Daytona Beach, Florida.

t. On or about the 18th day of May, 1979, defendant STEVEN HENRY RIDDLE made a telephone call.

u. On or about the 22nd day of May, 1979, defendant STEVEN HENRY RIDDLE made a telephone call.

v. On or about the 26th day of May, 1979, defendant STEVEN HENRY RIDDLE made a telephone call.

w. On or about the 2nd day of June, 1979, a telephone call was made from Daytona Beach, Florida, to Waco, Texas.

x. On or about the 3rd day of June, 1979, a telephone call was mde from Waco, Texas, to Daytona Beach, Florida.

y. On or about the 3rd day of June, 1979, defendant GREGORY LOUIS MCCAFFERTY, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

z. On or about the 4th day of June, 1979, defendant MARSHALL MECHANIK, using the name Michael Patrick Flanagan, rented a Ryder rental truck near Spartanburg, South Carolina.

aa. On or about the 5th day of June, 1979, a phone call was made from Taylorsville, Kentucky, to Cleveland, Ohio.

bb. On or about he 4th day of June, 1979, defendant JAMES F. CHADWICK received a phone call from near Spartanburg, South Carolina.

cc. On or about the 5th day of June, 1979, in Cleveland, Ohio, defendant GREGORY LOUIS MCCAFFERTY, using the name George T. Markos, exchanged the Ryder truck which he had rented on June 3, 1979, for a larger Ryder rental truck.

dd. On or about the 4th day of June, 1979, defendants MARSHALL MECHANIK, SHAHBAZ SHANE ZARINTASH, and LEON JACQUES GAST traveled from near Spartanburg, South Carolina, to near Charleston, Kanawha County, West Virginia.

ee. On or about the 5th day of June, 1979, defendant STEVEN HENRY RIDDLE made a telephone call.

ff. On or about the 5th day of June, 1979, defendants CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, and GREGORY LOUIS MCCAFFERTY, traveled from near Cleveland, Ohio, to Ripley, Jackson County, West Virginia.

gg. On or about the 5th day of June, 1979, defendant RUSSELL KOOK, using the name Russell Cook, registered at a motel in Ripley, West Virginia.

hh. On or about the 5th and 6th days of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL traveled on the aforesaid DC-6 aircraft containing approximately ten tons of marihuana from outside the United States, particularly Columbia, South America, to the Kanawha County Airport.

ii. At approximately 12:15 a.m. on the 6th day of June, 1979, defendamt JAMES F. CHADWICK arrived at the Kanawha County Jail, Charleston, West Virginia.

jj. At approximately 12:30 a.m. on the 6th day of June, 1979, defendant MARK DOUGLAS CHADWICK traveled to the Eagle Aviation Terminal at the Kanawha County Airport.

kk. At approximately 12:30 a.m. on the 6th day of June, 1979, defendants GREGORY LOUIS MCCAFFERTY, CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, SHAHBAZ SHANE ZARINTASH, LEON JACQUES GAST, MARSHALL MECHANIK, STEVEN HENRY RIDDLE and unknown others traveled to the general Aviation Area of the Kanawha County Airport in two Ryder rental trucks to meet the aforesaid DC-6 aircraft and receive its contraband cargo.

ll. At approximately 12:40 a.m. on the 6th day of June, 1979, at the Kanawha County Airport, defendant

MARK DOUGLAS CHADWICK had a conversation with defendant SHAHBAZ SHANE ZARINTASH.

mm. In the early morning hours of the 6th day of June, 1979, at the General Aviation Area of the aforesaid Kanawha County Airport, defendant SHAHBAZ SHANE ZARINTASH possessed radio equipment for the purpose of communicating from the ground to airborne aircraft.

nn. In the early morning hours of the 6th day of June, 1979, at the Kanawha County Airport, defendant MARK DOUGLAS CHADWICK possessed a hand-held communication unit.

oo. At approximately 12:45 a.m. on the 6th day of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL requested the control Tower at the Kanawha County Airport to provide landing instructions for the aforesaid DC-6 aircraft.

pp. At approximately 12:53 a.m. on the 6th day of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL attempted to land the aforesaid DC-6 aircraft at the Kanawha County Airport.

qq. At approximately 1:00 a.m. on the 6th day of June, 1979, defendant JAMES F. CHADWICK received a telephone call at the Kanawha County Jail, Charleston, West Virginia.

rr. At approximately 1:05 a.m. on the 6th day of June, 1979, defendant MARK DOUGLAS CHADWICK advised the defendants and unknown others in the aforesaid Ryder rental trucks that their plane had crashed and that their cargo was all over the hillside.

ss. At approximately 1:05 a.m. on the 6th day of June, 1979, defendant MARK DOUGLAS CHADWICK aided the flight of the defendants and unknown others in the aforesaid Ryder rental trucks from the premises of the Kanawha County Airport.

tt. At approximately 1:10 a.m. on the 6th day of June, 1979, defendant JAMES F. CHDAWICK arrived at the scene of the crash of the aforesaid DC-6 aircraft.

uu. At approximately 1:10 a.m. on the 6th day of June, 1979, defendant MARK DOUGLAS CHADWICK falsely advised the Kanawha County Sheriff's Department and its personnel that he was on Greenbrier Street and proceeding to the airport, when, in fact, he was then present at the Kanawha County Airport.

vv. From approximately 12:53 a.m. until approximately 2:07 a.m. on the 6th day of June, 1979, defendant MARK DOUGLAS CHADWICK intentionally withheld from law enforcement authorities his knowledge of the presence and flight of the two Ryder rental trucks and their occupants from the Kanawha County Airport.

ww. At approximately 2:07 a.m. on the 6th day of June, 1979, defendant MARK DOUGLAS CHADWICK falsely advised the Kanawha County Sheriff's Department and its representatives that he had observed one Ryder truck containing one white male; and

xx. Other overt acts.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371.

SECOND COUNT

On or about the 6th day of June, 1979, at the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, and JEROME OTTO LILL, aided and abetted by each other, did unlawfully import in the United States from a place outside thereof approximately 20,000 pounds of marihuana, a Schedule I non-narcotic controlled substance as defined in Title 21, Code of Federal Regulations, Section 1308.11(d)(13); in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

THIRD COUNT

On or about the 5th and 6th days of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, and JEROME OTTO LILL, aided and abetted by each other, did travel in interstate and foreign commerce from points outside the state of West Virginia and the United States of America, that is, Columbia in South America, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment nad carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

FOURTH COUNT

On or about the 6th day of June, 1979, at Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, and JEROME OTTO LILL, aided and abetted by each other, did unlawfully, knowingly, intentionally and without authority possess with intent to distribute a controlled substance, that is, approximately 20,000 pounds of marihuana, a Schedule I non-narcotic controlled substance as defined by Title 21, Code of Federal Regulations, Section 1308.11(d)(13); in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

FIFTH COUNT

On or about the 4th day of June, 1979, at or near Belle, Kanawha County, West Virginia, and within the

Southern District of West Virginia, defendant JAMES F. CHADWICK did knowingly and intentionally use a communication facility, that is, the telephone, to receive and transmit information between the Southern District of West Virginia and a point near Spartanburg in the State of South Carolina, in committing, causing and facilitating the commission of acts constituting felonies under the provisions of subchapters I and II of Chapter 13, jTitle 21, United States Code, that is, Sections 841(a)(1), 846 and 952(a) of Title 21, United States Code; in violation of Title 21, United States Code, Section 843(b).

SIXTH COUNT

On or about the 5th day of June, 1979, defendant GREGORY LOUIS MCCAFFERTY, also known as Greg Jack and as George T. Markos, did travel in interstate commerce from near Cleveland, Ohio to the Kanawha County Airport near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on nd facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

SEVENTH COURT

On or about the 5th day of June, 1979, defendant RUSSELL KOOK, also known as Russell Cook, did travel in interstate commerce from near Cleveland, Ohio to the Kanawha County Airport near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful

activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did therefore perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

EIGHTH COUNT

On or about the 5th day of June, 1979, defendant CRAIG BRUCE MCGILVRAY did travel in interstate commerce from near Cleveland, Ohio to the Kanawha County Airport near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code Section 1952(a)(3).

NINTH COUNT

On or before the 5th day of June, 1979, defendant SHAHBAZ SHANE ZARINTASH did travel in interstate commerce from points outside the State of West Virginia, including New York City, New York, and near Spartanburg, South Carolina, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3)

TENTH COUNT

On or about the 4th day of June, 1979, defendant MARSHALL MECHANIK, also known as Michael Patrick Flanagan, did travel in interstate commerce from at or near Spartanburg, South Carolina to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

ELEVENTH COUNT

On or before the 5th day of June, 1979, defendant LEON JACQUES GAST did travel in interstate commerce from points outside the State of West Virginia, including New York City, New York, and near Spartanburg, South Carolina, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

TWELFTH COUNT

On or before the 5th day of June, 1979, defendant STEVEN HENRY RIDDLE did travel in interstate

commerce from points outside the State of West Virginia, including Taylorsville, Kentucky to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

A True Bill.

Harry M. Slaughter /sig/
Foreman

ROBERT B. KING
United States Attorney

By. E. LESLIE HOFFMAN III
Assistant United States Attorney.

A TRUE COPY, Certified this
31st day of March, 1980

JAMES A. MCWHORTER, CLERK
By *Rhonda Matson /sig/*
Deputy

Redacted Indictment

REDACTED
4/30/80
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AUGUST 9, 1979 SESSION, GRAND JURY NO. TWO
CHARLESTON

UNITED STATES OF AMERICA

V.

BRECK DANA ANDERSON
DAVID THOMAS SEESING
JEROME OTTO LILL
MARK DOUGLAS CHADWICK
JAMES F. CHADWICK
CRAIG BURCE MCGILVRAY
RUSSELL KOOK, also known
as Russell Cook
GREGORY LOUIS MCCAFFERTY,
also known as Greg Jack and as
George T. Markos
SHAHBAZ SHANE ZARINTASH
LEON JACQUES GAST
MARSHALL MECHANIK, also known as
Michael Patrick Flanagan
STEVEN HENRY RIDDLE

Criminal No. 79-20056-01

18 U.S.C. § 371 — Ct. 1
21 U.S.C. § 952(a) and
18 U.S.C. § 2 — Ct. 2
18 U.S.C. § §§1952(a)(3)
and 2 — Ct.3
21 U.S.C. § 841(a)(1) and
18 U.S.C. § 2 — Ct. 4
21 U.S.C. § 843(b) — Ct. 5
18 U.S.C. § 1952(a)(3) —
Cts. 6, 7, 8, 8, 10, 11 and 12

The Grand Jury Charges:

FIRST COUNT

1. That for an unknown period of time up to and including the 6th day of June, 1979, at Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, and elsewhere, BRECK DANA ANDERSON, DAVID THOAMS SEESING, JEROME OTTO LILL, MARK DOUGLAS CHADWICK, JAMES F. CHADWICK, CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, also known as Russell Cook, GREGORY LOUIS MCCAFFERTY, also known as Greg Jack and as George T. Markos, SHAHBAZ SHANE ZARINTASH, LEON JACQUES GAST, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, and STEVEN HENRY RIDDLE, the defendants, did wilfully and knowingly combine, conspire, confederate and agree together and with each other and with divers other persons, whose names are to the grand jury unknown, to commit offenses against the United States, that is:

a. To unlawfully, knowingly, intentionally and without authority possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1);

b. To travel in interstate and foreign commerce with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving a controlled substance, in violation of Title 18, United States Code, Section 1952(a)(3);

c. To import into the customs territory of the United States from a place outside thereof a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a); and

d. To use a communication facility, that is, the telephone, in committing, causing and facilitating the commission of acts constituting felonies under the provisions of subchapters I and II of Title 21, United States Code, in violation of Title 21, United States Code, Section 843(b).

2. It was a part of this conspiracy that the defendants and co-conspirators would and did use communication facilities, that is, telephones, in interstate and foreign commerce between various points within and without the United States of America, including but not limited to New York City and other points in the State of New York; Boca Raton, Daytona Beach, Hollywood, Miami and Sarasota in the State of Florida; Parma and Cleveland in the State of Ohio; Madison in the State of Wisconsin; Spartanburg in the State of South Carolina; Waco in the State of Texas; and Belle, Charleston, Parkersburg and Ripley in the State of West Virginia, in committing, causing and facilitating the commission of violations of the Drug Control statues of the United States.

3. It was further part of this conspiracy that defendants MARK DOUGLAS CHADWICK and JAMES F. CHADWICK, acting under color of their office, that is, each being a Deputy Sheriff of Kanawha County, would and did arrange with their close friend, defendant SHAHBAZ SHANE ZARINTASH, to do the following:

(a) Provide a safe and secure place to land a DC-6 aircraft carrying a contraband cargo at the Kanawha County Airport near Charleston, West Virginia;

(b) Provide a safe and secure place for the aforesaid DC-6 aircraft to be unloaded at the Kanawha County Airport near Charleston, West Virginia; and

(c) Provide the defendants and co-conspirators with a safe departure from the airport.

4. It was part of this conspiracy that defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL would travel in interstate and foreign commerce, via a DC-6 aircraft, from points outside the United States to a point within the United States, that is, Charleston, Kanawha County, West Virginia, by following a flight plan that included San Marcos, in Columbia, South America; Kingston in Jamaica; Inagua in the Bahama Islands; Fayetteville and Greensboro in the State of North Carolina; and Pulaski in the State of Virginia.

5. It was further part of this conspiracy that the aforesaid DC-6 aircraft would carry as contraband cargo approximately 20,000 pounds (ten tons) of marihuana, a Schedule I non-narcotic controlled substance.

6. It was further part of this conspiracy that during the early morning hours of the 6th day of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL would land the aforesaid DC-6 aircraft at the Kanawha County Airport near Charleston, West Virginia.

7. It was further part of this conspiracy that defendants CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, also known as Russell Cook, GREGORY LOUIS MCCAFFERTY, also known as Greg Jack and as Geroge T. Markos, SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, LEON JACQUES GAST, STEVEN HENRY RIDDLE and others unknown to the grand jury, would travel in interstate commerce from points outside the State of West Virginia to the Kanawha County Airport near Charleston, West Virginia, with intent to meet the aforesaid DC-6 aircraft and receive the aforesaid contraband cargo which it carried.

8. It was further part of this ocnspiracy that defendants MARK DOUGLAS CHADWICK, CRAIG BRUCE MCGILVRAY, RUSSEL KOOK, also known as

Russell Cook, GREGORY LOUIS MCCAFFERTY, also known as Greg Jack and as George T. Markos, SHAHBAZ SHANE ZARINTASH, LEON JACQUES GAST, MARSHALL MECHANIK, also known as Michael Patrick Flanagan, and STEVEN HENRY RIDDLE would be at the Kanawha County Airport near Charleston, West Virginia, in the early morning hours of the 6th day of June, 1979, to meet the aforesaid DC-6 aircraft and receive the contraband cargo which it carried.

OVERT ACTS

9. In order to further the objects and purposes of the aforesaid conspiracy, the defendants and co-conspirators did commit the following and other overt acts:

a. On or about the 19th day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Cleveland, Ohio.

b. On or about the 19th day of April, 1979, a phone call was made from Daytona Beach, Florida, to Cleveland, Ohio.

c. On or about the 20th day of April, 1979, defendant GREGORY LOUIS MCCAFFERTY, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

e.On or about the 23rd day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Daytona Beach, Florida.

f. On or about the 27th day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Cleveland, Ohio.

g. On or about the 28th day of April, 1979, defendant MARSHALL MECHANIK, using the name Michael Patrick Flanagan, rented a Ryder rental truck in Charleston, West Virginia.

h. On or about the 28th day of April, 1979, defendant GREGORY LOUIS MCCAFFERTY, using the name

George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

i. On or about the 3rd day of May, 1979, a phone call was made from Daytona Beach, Florida, to Waco, Texas.

j. On or about the 3rd day of May, 1979, a phone call was made from Daytona Beach, Florida, to Cleveland, Ohio.

k. On or about the 5th day of May, 1979, defendant GREGORY LOUIS MCCAFFERTY, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

l. On or about the 5th day of May, 1979, defendant MARSHALL MECHANIK, using the name Michael P. Flanagan, traveled to Charleston, West Virginia.

m. On or about the 3rd day of June, 1979, a telephone call was made from Waco, Texas, to Daytona Beach, Florida.

n. On or about the 3rd day of June, 1979, defendant GREGORY LOUIS MCCAFFERTY, using the name George T. Markos, rented a Ryder rental truck in C eland, Ohio.

o. On or about the 4th day of June, 1979, defendant MARSHALL MECHANIK, using the name Michael Patrick Flanagan, rented a Ryder rental truck near Spartanburg, South Carolina.

p. On or about the 5th day of June, 1979, in Cleveland, Ohio, defendant GREGORY LOUIS MCCAFFERTY, using the name George t. Markos, exchanged the Ryder rental truck which he had rented on June 3, 1979, for a larger Ryder rental truck

q. On or about the 4th day of June, 1979, defendants MARSHALL MECHANIK, SHAHBAZ SHANE ZARINTASH, and LEON JACQUES GAST traveled from near Spartanburg, South Carolina, to near Charleston, Kanawha County, West Virginia.

r. On or about the 5th day of June, 1979, defendants CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, and GREGORY LOUIS MCCAFFERTY, traveled from near Cleveland, Ohio, to Ripley, Jackson County, West Virginia.

s. On or about the 5th day of June, 1979, defendant RUSSELL KOOK, using the name Russell Cook, registered at a motel in Ripley, West Virginia.

t. On or about the 5th and 6th days of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL traveled on the aforesaid DC-6 aircraft containing approximately ten tons of marihuana from outside the United States, particularly Columbia, South America, to the Kanawha County Airport.

u. At approximately 12:15 a.m. on the 6th day of June, 1979, defendant JAMES F. CHADWICK arrived at the Kanawha County Jail, Charleston, West Virginia.

v. At approximately 12:30 a.m. on the 6th day of June, 1979, defendant MARK DOUGLAS CHADWICK traveled to the Eagle Aviation Terminal at the Kanawha County Airport.

w. At approximately 12:30 a.m. on the 6th day of June, 1979, defendants GREGORY LOUIS MCCAFFERTY, CRAIG BRUCE MCGILVRAY, RUSSELL KOOK, SHAHBAZ SHANE ZARINTASH, LEON JACQUES GAST, MARSHALL MECHANIK, STEVEN HENRY RIDDLE and unknown others traveled to the General Aviation Area of the Kanawha County Airport in two Ryder rental trucks to meet the aforesaid DC-6 aircraft and receive its contraband cargo.

x. At approximately 12:40 a.m. on the 6th day of June, 1979, at the Kanawha County Airport, defendant MARK DOUGLAS CHADWICK had a conversation with defendant SHAHBAZ SHANE ZARINTASH.

y. In the early morning hours of the 6th day of June, 1979, at the General Aviation Area of the aforesaid Kanawha County Airport, defendant SHAHBAZ SHANE ZARINTASH possessed radio equipment for the purpose of communicating from the ground to airborne aircraft.

z. In the early morning hours of the 6th day of June, 1979, at the Kanawha County Airport, defendant MARK DOUGLAS CHADWICK possessed a hand-held communication unit.

aa. At approximately 12:45 a.m. on the 6th day of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL requested the Control Tower at the Kanawha County Airport to provide landing instructions for the aforesaid DC-6 aircraft.

bb. At approximately 12:53 a.m. on the 6th day of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING and JEROME OTTO LILL attempted to land the aforesaid DC-6 aircraft at the Kanawha County Airport.

cc. And other overt acts.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371.

SECOND COUNT

On or about the 6th day of June, 1979, at the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, and JEROME OTTO LILL, aided and abetted by each other, did unlawfully import into the United States from a place outside thereof approximately 20,000 pounds of marihuana, a Schedule I non-narcotic controlled substance as defined in Title 21, Code of Federal Regulations, Section 1308.11(d)(13); in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

THIRD COUNT

On or about the 5th and 6th days of June, 1979, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, and JEROME OTTO LILL, aided and abetted by each other, did travel in interstate and foreign commerce from points outside the state of West Virginia and the United States of America, that is, Columbia in South America, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

FOURTH COUNT

On or about the 6th day of June, 1979, at Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, defendants BRECK DANA ANDERSON, DAVID THOMAS SEESING, and JEROME OTTO LILL, aided and abetted by each other, did unlawfully, knowingly, intentionally and without authority possess with intent to distribute a controlled substance, that is, approximately 20,000 pounds of marihuana, a Schedule I non-narcotic controlled substance as defined by Title 21, Code of Federal Regulations, Section 1308.11(d)(13); in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

SEVENTH COUNT

On or about the 5th day of June, 1979, defendant RUSSELL KOOK, also known as Russell Cook, did

travel in interstate commerce from near Cleveland, Ohio to the Kanawha County Airport near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

NINTH COUNT

On or before the 5th day of June, 1979, defendant SHAHBAZ SHANE ZARINTASH did travel in interstate commerce from points outside the State of West Virginia, including New York City, New York, and near Spartanburg, South Carolina, to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3)

TENTH COUNT

On or about the 4th day of June, 1979, defendant MARSHALL MECHANIK, also known as Michael Patrick Flanagan, did travel in interstate commerce from at or near Spartanburg, South Carolina to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish,

carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish, and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

TWELFTH COUNT

On or before the 5th day of June, 1979, defendant STEVEN HENRY RIDDLE did travel in interstate commerce from points outside the State of West Virginia, including Taylorsville, Kentucky to the Kanawha County Airport, near Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, and did thereafter perform, attempt to perform, and cause to be performed acts to promote, manage, establish and carry on said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

A True Bill.

Foreman.

ROBERT B. KING
United States Attorney

By:
Assistant United States Attorney

A TRUE COPY, Certified this
31st day of March, 1980
JAMES A. McWHORTER, CLERK
By
Deputy

Defendant's Omnibus Pretrial Motion - Relevant Portion

Unauthorized Persons
Before Grand Jury

The defendants seek a list of all persons who appeared before the grand jury during the course of its investigation, to determine whether or not Rule 6 of the Federal Laws of Criminal Procedure were complied with. Recently, courts have discovered that unauthorized persons appeared before the grand jury, such as, a technician or an Internal Revenue Service agent, and, as a consequence, the indictment had to be dismissed. In order to fully explore this complaint, it is essential that we have a list of all persons who appeared before the grand jury during its ivestigation.

Government's Pretrial Response - Relevant Portion

VIII

RESPONSE TO "UNAUTHORIZED PERSONS BEFORE GRAND JURY"

As previously stated, there were no unauthorized persons appearing before the grand jury on behalf of the government in this case.

Defendant's Motion for Dismissal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

UNITED STATES OF AMERICA

VS.

BRECK DANA ANDERSON, ET AL.

CRIMINAL NOS. 79-20045
79-20056

MOTION FOR DISMISSAL

Each of the seven defendants, by counsel, moves this Court for an order dismissing this indictment.

The grounds for renewing this previously made pretrial motion have recently come to counsel's attention when the grand jury testimony of Agents Rheinhart and James was made available to them. That testimony revealed:

(1) That unauthorized persons appeared before the grand jury

(2) That there was no competent evidence, but rather only speculation and conclusions unsupported by facts upon which the grand jury could base an indictment.

(3) Witnesses remained in the grand jury after they had testified while the prosecution instructed the grand jury on the law.

(4) Testimony of the prosecutor, comments of the witnesses prejudiced the grand jury unfairly, and denied defendants due process.

/s/ Alan Silber
ALAN SILBER
Attorney for Marshall Mechanik

/s/ Richard G Chosid
RICHARD G. CHOSID
Attorney for Jerome O. Lill

/s/ Edwin F Kagin, Jr
EDWIN F. KAGIN, JR.
Attorney for Stephan H. Riddle

/s/ Michael B Pollack
MICHAEL B. POLLACK
Attorney for Shabaz Shane Zarintash

/s/ D. J. Esposito
D. J. ESPOSITO
Attorney for Shabaz Shane Zarintash

/s/ W Dale Greene
W. DALE GREENE
Attorney for Mark Chadwick

/s/ John B Carrico
JOHN B. CARRICO
Attorney for James F. Chadwick

/s/ Charles W Giesen
CHARLES W. GIESEN
Attorney for Russell Kook

District Court's Order, March 14, 1980, Denying Defendant's Motion for Dismissal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

UNITED STATES OF AMERICA

V.

JEROME OTTO LILL
MARK DOUGLAS CHADWICK
JAMES F. CHADWICK
RUSSELL KOOK, also known
as Russell Cook
SHAHBAZ SHANE ZARINTASH
MARSHALL MECHANIK, also known
as Michael Patrick Flanagan
STEVEN HENRY RIDDLE

CRIMINAL NO. 79-20056

ORDER

Before the Court is the motion of the seven defendants on trial to dismiss the indictment herein on grounds of an alleged violation of the provisions of Rule 6(d), Federal Rules of Criminal Procedure, involving the alleged presence of an unauthorized person before the grand jury which returned the indictment herein on August 10, 1979;

And the Court having maturely considered the aforesaid motion, the evidence relating to the motion, the memoranda of law submitted by the parties, and the argument of counsel with respect thereto, is of the opinion that the motion to dismiss should be, and it is hereby, denied.

In connection therewith, the Court has made certain findings and conclusions on the record herein, which findings and conclusions are hereby adopted by reference and made a part hereof. In addition, the Court finds as follows:

1. Drug Enforcement Administration Agents James and Rinehart appeared before the grand jury as a joint witness in connection with the presentation of the aforesaid indictment on August 10, 1979.

2. That immediately upon entry to the grand jury room, and prior to the presentation of the indictment to the grand jury and the giving of their testimony, Agents James and Rinehart were administered an oath by the grand jury foreman.

3. At the time of their appearance before the grand jury on August 10, 1979, the aforesaid Drug Enforcement Administration Agents were government personnel to whom disclosure of grand jury material was authorized, and had been made, in connection with the investigation of this case, pursuant to the provisions of Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure.

4. Under all of the facts and circumstances of this case, the Court finds that neither Agent James nor Agent Rinehart, as a sworn joint witness under examination, was an unauthorized person before the grand jury.

5. Presenting the testimony of Agents James and Rinehart as a joint witness was proper under the provisions of Rule 6(d), Federal Rules of Criminal Procedure, and was a reasonable and permissible manner in which to conduct the grand jury proceedings on that occasion.

The defendants having further moved the Court for a stay of the trial in this case, which commenced on February 19, 1980, pending their attempt to seek review by the United States Court of Appeals for the Fourth Circuit of the Court's ruling herein;

IT IS ORDERED that the motion for a stay of this trial be and it is hereby overruled and denied.

The Clerk of this Court is hereby directed to mail a certified copy of this order to all counsel of record.

ENTER: March 14, 1980

/s/ Dennis R. Knapp
DENNIS R. KNAPP
Chief United States District Judge

A TRUE COPY, Certified this
17th day of MARCH, 1980
JAMES A. MCWHORTER, CLERK
By */s/ Rhonda Matson*
Deputy

Defendant's Motion for Rehearing, May 5, 1980

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

Criminal No. 79-20056

Plaintiff,

THE UNITED STATES OF AMERICA,

v.

Defendants,

JEROME OTTO LILL, MARK DOUGLAS CHADWICK, JAMES F. CHADWICK, RUSSELL KOOK, SHABAZ SHANE ZARINTASH, STEPHEN HENRY RIDDLE and MARCHSLL MECHANIK.

To: UNITED STATES ATTORNEY
Southern District of West Virginia
United States Court House
Charleston, West Virginia

Sir:

PLEASE TAKE NOTICE that on a date and time to be set by the Court, the undersigned, attorneys for the defendants herein, will move before the Honorable John T. Copenhaver, Jr., U.S.D.C.J., at the United States Court House, Charleston, West Virginia, for a rehearing of defendants' Motion to Dismiss the Indictment on the grounds that unauthorized persons appeared in Grand Jury.

This Motion was heard and denied by the Honorable Dennis R. Knapp on March 14, 1980. On April 30, 1980, the Honorable Robert B. Stokes, U.S.D.C.J., in *United States v. Winter*, decided a motion which embraced the

exact same issue as previously raised by the defendants herein. Judge Stokes dismissed the Indictment because two persons had appeared in the Grand Jury as a "joint witness".

In view of the fact that another United States District Court Judge from the Southern District of West Virginia ruled in a diametrically opposite way than Judge Knapp had ruled on an identical question, the defendants respectfully request a rehearing on the Motion to Dismiss the Indictment on the grounds that unauthorized persons appeared in Grand Jury.

In suport of this Motion, defendants will rely upon the Briefs filed heretofore on the Motion to Dismiss before the Honorable Dennis R. Knapp, U.S.D.C.J., and the supplemental Briefs on the issue which were filed in the Fourth Circuit of the United States Court of Appeals. Defendats will also rely upon the Order and transcript of the hearing in *United States v. Winter*, which will be supplied to the Court as soon as available.

JOHN B. CARRICO, ESQ.
Attorney for Defendant, James F. Chadwick

RICHARD G. CHOSID, ESQ.
Attorney for Defendant Jerome Otto Lill

W. DALE GREEN, ESQ.
Attorney for Defendant Mark Douglas Chadwick

CHARLES W. GEISEN, ESQ.
Attorney for Defendant Russell Kook

MICHAEL B. POLLACK, ESQ. and
NICHOLAS ESPOSITO, ESQ.
Attorneys for Defendant Shahbaz S. Zarintash

EDWIN F. KAGIN, JR., ESQ.
Attorney for Defendant Steven Henry Riddle

PODVEY & SACHS, P.C.
Attorneys for Defendant Marshall Mechanik

/s/ Alan Silber
By: ALAN SILBER

Dated: May 5, 1980

CERTIFICATION

I hereby certify that a copy of the foregoing Motion has been duly served upon the United States Attorney for the Southern District of West Virginia at the United States Court House, Charleston, West Virginia.

/s/ Alan Silber
ALAN SILBER

Dated: May 5, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

at Charleston

IN RE:

Grand Jury Proceedings
(Grand Jury Number Two)

Criminal Matter No. 79-0308

The testimony of the witness taken on June 12, 1979, at the Grand Jury Room, Federal Building, 500 Quarrier Street, Charleston, Kanawha County, West Virginia.

APPEARANCES: WAYNE A. RICH., ESQ.
Assistant United States Attorney

E. LESLIE HOFFMAN, III, ESQ.
Assistant United States Attorney

* * * * * * * * * * * * * * * *

(Witness sworn; 2:08 p.m.)

(WHEREUPON, Grand Jury Exhibits Nos. 3, 3-A, 3-B, and 3-C were marked for identification.)

THEREUPON came

MARSHA MILLER, called as a witness, who, having been first duly sworn according to law, testified as follows:

EXAMINATION

BY MR. RICH:

Q State your name, please.

A Marsha Miller.

Q By whom are you employed?

A Ryder Truck Rental.

(69)

Q Where is your office located at the present time?

A 1408 Blizzard Drive, Parkersburg.

Q Marsha, I'm going to show you a copy of a subpoena marked as Grand Jury Exhibit No. 3 in Case No. 79-0308, today's date. Are you appearing here pursuant to that subpoena (indicating)?

A Yes, sir.

Q Were the records searched at the business, being Ryder Truck Rental, Inc., 1400 Blizzard, Parkersburg, West Virginia, to find the materials called for in the subpoena?

A Yes, sir.

Q Is it my understanding you found three contracts specified in the subpoena?

A Yes, sir.

Q The first contract is Rental Contract 357829. Is that correct (indicating)?

A Yes, sir.

Q And it's been marked as Grand Jury Exhibit No. 3-A in this case under today's date, is that correct?

A Yes, sir.

(70)

Q Are those your initials and the date in the red marker at the top there (indicating)?

A Yes, sir.

Q The second one is Rental Contract 357842, is that correct?

A Yes, sir.

Q On the reverse side, again it's marked as Grand Jury Exhibit 3-B, with your initials and the date in red marker at the top. Is that correct (indicating)?

A Yes, sir.

Q And the third one is 357849 (indicating), and it is marked on the back as Grand Jury Exhbiit 3-C, with your initials and today's date in red marker once again, is that correct (indicating)?

A Yes, sir.

Q Were these three documents made and maintained in the normal ordinary course of business of Ryder Truck Rental in Parkersburg?

A Yes, sir, they were.

Q And you are the custodian of these documents?

A Yes, sir.

Q And what is your position at the present time with Ryder Truck?

A I'm administrative manager.

(71)

Q And as administrative manager, you have custody over these documents?

A Yes, sir.

Q Okay. Marsha, I'd like to show you the first one, which is 3-A, Rental Contract 357829, and I realize you were not present when this was filled out, but by looking at the document can you tell me whether or not it indicates that the truck was actually picked up by the customer?

A No, sir. He had rented it, but he didn't show up to pick it up on the first two contracts.

Q Does it indicate it was reserved for the week of April 21, 1979, to April 28, 1979?

A Yes, sir.

Q As to the second contract, Exhibit 3-B, does it indicate whether or not the customer picked up this particular truck?

A No, sir, he didn't. We had to hold it again for another week.

Q And that week was April 30, 1979, to May 4, 1979?

A Yes, sir.

(72) Q And the third contract, does it indicate, which is 3-C, does it indicate whether or not this particular vehicle was picked up?

A It was reserved again.

Q And not picked up?

A Right.

Q And that reservation on this third occasion was from May 4, '79, to May 11, '79?

A Yes, sir.

Q In all three instances, in fact, it was the same vehicle, is that right?

A Yes, sir, the same truck for him week after week.

Q And that's why the mileage in and mileage out is the same on the three contracts?

A Yes, sir. The truck never left our property.

Q It shows Dealer Number 253110. Do you know what dealer number that is?

A Yes, sir.

Q What is that?

A A & M Automotive.

Q Automotive Leasing System?

A Yes.

(73) Q Is that at 410 Fiftieth Street in Charleston, West Virginia?

A Yes, sir.

MR. RICH: Any questions by members of the grand jury?

(No response.)

MR. RICH: Thank you, Marsha. You're excused.

(Witness excused; 2:13 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

at Charleston

IN RE:

Grand Jury Proceedings
(Grand Jury Number Two)

Criminal Matter No. 79-0308

The testimony of the witnesses taken on June 13, 1979, at the Grand Jury Room Federal Building, 500 Quarrier Street, Charleston, Kanawha County, West Virginia.

APPEARANCES: ROBERT B. KING, ESQ.
United States Attorney

WAYNE A. RICH, JR., ESQ.
Assistant United States Attorney

E. LESLIE HOFFMAN, III, ESQ.
Assistant United States Attorney

(240)

A Police officer.

Q Who do you work for?

A Kanawha County Sheriff's Department.

Q What is your rank?

A Corporal.

Q How long have you been with the Sheriff's Department?

A Eight years.

Q Corporal Meadows, what were you doing on the evening of june 5th and June 6th?

A I worked the evening shift in the jail and midnight shift in the Comm Center.

Q What's the evening shift?

A From four to twelve.

Q And midnight shift is what?

A From twelve o'clock till eight o'clock the next morning.

Q So you worked all night?

A Yes, sir.

Q Two shifts?

A Yes, sir.

Q Was that because of the emergency that occurred?

(241)

A Yes, sir.

Q You hadn't planned to work over all night?

A No, sir.

Q All right. On the evening of the 5th and 6th, around midnight, did you have occasion to see Sergeant Jim Chadwick?

A Yes, sir, right after midnight.

Q Was that the first time you had seen him that evening?

A Yes, sir.

Q Where did you see him?

A He came through the door into the lobby of the Kanawha County Jail.

Q How was he dressed?

A He was dressed in a blue sport coat, and I don't remember the color of his tie or shirt.

Q He wasn't in uniform?

A No, sir.

Q Was he on duty that night?

A No, sir.

Q Did you hve any conversation with him?

A Yes, sir. When I walked over to him, he said "What in the hell are you still here for?"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

at Charleston

IN RE:

Grand Jury Proceedings
(Grand Jury Number Two)

Criminal Matter No. 79-0308

The testimony of the witnesses taken on June 13, 1979, at the Grand Jury Room, Federal Building, 500 Quarrier Street, Charleston, Kanawha County, West Virginia.

APPEARANCES: ROBERT B. KING, ESQ.
United States Attorney

WAYNE A. RICH, JR., ESQ.
Assistant United States Attorney

E. LESLIE HOFFMAN, III. ESQ.
Assistant United States Attorney

(182) it's all right with you, Mr. Foreman, is read this exhibit and then Sergeant Mullins can make such additions and corrections as are necessary and appropriate, and myself or members of the grand jury can ask whatever questions are qppropriate.

Is that all right with you?

A Yes.

Q This starts out 'Activity Report of plane crash that occurred at approximately 0100 hours on Wednesday, June 6, 1979. This recording is made by Sgt. L. B. Mullins, Kanawha County Sheriff's Department, Elk Detachment.

"At approximately 12:00 mid-night on June 6, 1979 the undersigned officer responded to Headquarters and went to the 4th floor gym to exercise. At approximately 12:15 the undersigned officer asked inmate Louie Walton to come up to the 4th floor and help the undersigned hang a heavy-bag for exercise purposes. Inmate Walton advised the undersigned officer that Sgt. Jim Chadwick was downstairs in the lobby of the jail and had gone into his office and was making phone calls. The undersigned officer asked inmate Walton why he was there and inmate Walton replied he had no idea, that he never came in at this time or during the night. Inmate Walton assisted the undersigned officer

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTICT OF WEST VIRGINIA
at Charleston

IN RE:

Federal Grand Jury Proceedings
Number 2

Criminal Matter
Number 79-0308

The testimony of witnesses taken June 14, 1979, at Courtroom Number 1, United States Federal Building, 500 Quarrier Street, Charleston, West Virginia.

APPEARANCES: ROBERT B. KING, ESQUIRE
United States Attorney

E. LESLIE HOFFMAN III, ESQUIRE
Assistant United States Attorney

WAYNE A. RICH, JR., ESQUIRE
Assistant United States Attorney

(7) are twelves, eighteens and twenty-twos.

Q During the course of your business there renting Ryder trucks, did you become familiar with the name Michael P. Flannagan?

A Yes, I did.

Q How did you become familiar with that name?

A Mr. Flannagan called and specified a special truck he wanted, the size, the model.

Q Yes, sir. Now, when did that occur? Do you remember when the call was?

A It was about the middle — I believe about the middle of May.

Q All right, sir.

A He wanted a GMC, a 650, a twenty-two foot.

Q And did you reserve that truck for him?

A Well, I told Mr. Flannagan he'd have to come over and put up a deposit; I'd get the truck and hold it for him.

Q Yes, sir. And did he —

A He —

Q Did he come by?

(8) A He didn't come by right then, but he came by, maybe it was a week later, and told me he wanted it the next week. But that was on Memorial weekend. Then he came back and said he was mixed up on his weekends, he wanted it the following week.

Q Which week would that have been?

A On the fourth.

Q On the fourth of June?

A Yes, sir.

Q Did the person known to you as Michael Flannagan come by?

A That's right, he came by.

Q And what happened when he came by your station?

A Mr. Flannagan came by, he looked at the truck. I went with him up to the end of the lot to see if that was the one he wanted, and he put up the seventy-five dollar deposit.

Q Did he pay you in cash?

A Yes, sir.

Q All right. What happened next?

A I filled out the contract (indicating).

Q Yes, sir.

(9) A Then I gave Mr. Flannagan the key.

Q Yes, sir.

A And that was around — between nine and ten o'clock in the morning and he said it would be in the afternoon when he picked it up.

Q What day was this?

A That was on the fourth.

Q Did he come by and pick it up?

A He came by late that afternoon between five and five thirty and he picked the truck up.

Q Did he rent any other equipment from you?

A No, sir — well, the hand trucks. You know, moving like refrigerators, stoves.

Q Would you describe the hand trucks for us?

A Well, they have two wheels on them. They're hand trucks like you use for a refrigerator, stove, washing machine.

Q What did Mr. Flannagan present you in the way of a driver's license?

A Yes, sir. He gave me a Florida driver's license. The number is 742093, had a Florida identification on it.

Q I notice you're reading from a document there. I will ask you what document that is that you have in your hand?

(10) A This is a copy — the copy I made out of my book.

Q And have you this morning in the United States Attorney's Office looked at the original copy of your records from your service station in South Carolina?

A I have.

Q And have you compared the copy you have before you with the original document from your service station in South Carolina?

A Yes, sir, I have.

Q Is the copy before you now a true and correct copy of the document you have in your service station in South Carolina?

A Yes, sir.

Q I believe also that you turned the original copy — that is, the one on file in your service station in South Carolina —

A That's right.

(11) Q — over to Special Agent Randy James with the Drug Enforcement Administration this morning?

A Right.

Q And I believe also that you initialed and dated that original copy, is that correct?

A I sure did. Yes, sir.

Q All right, sir. I'd ask this copy you have referred to be marked as Grand Jury Exhibit 1.

(WHEREUPON, the document referred to was marked Grand Jury Exhibit Number 1, for purposes of identification.)

BY MR. HOFFMAN:

Q Let me go through this with you and ask you to explain just what Mr. Flannagan did when he came in and rented the truck regarding this rental contract.

A What do you mean, the day he came?

Q Yes, sir. How did you get the information to put on this contract?

A Well, I have the serial number of the truck. This is the top middle. Right up here in the middle. All right, the license number, my dealer number code goes right under there (indicating), then the time it is expected in, and the
(12) time out. And underneath there is the mileage, you know, when it's dispatched.

Q All right, sir. I notice a notation on the mileage in on the copy here. Is that a correct copy —

A No, sir, that's not. The carbon was off of another copy.

Q So, you're saying when they were copying off on another rental —

A That's right.

Q — the notations came through on this copy.

A That's right.

A And is that also true for the miles used notation?

A That's right.

Q On the copy?

A Yes.

Q However, the mileage out notation is correct?

A That's right.

Q For this truck, is that right?

A Yes, sir.

Q And that's fifty-six thousand miles, fifty-six thousand twenty-two miles?

(13) A That's right, sir.

Q And that's the correct mileage when you rented Mr. Flannagan the truck?

A Yes. Well, now, this does not show on the original.

Q You mean the miles used and the mileage in?

A That's right.

Q Did Mr. Flannagan sign this contract in your presence?

A Yes, sir, his initials right here where he declined insurance for the cargo and for the truck.

Q You're referring to the left-hand column —

A That's right.

Q — under personal accident and cargo insurance?

A That's right.

Q And he initialed that?

A That's right.

Q Where he declined that and he declined also collision damage waiver, is that correct?

A That's right.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

at Charleston

IN RE:

Grand Jury Proceedings
(Grand Jury Number Two)

Criminal Matter No. 79-0366

The testimony of the witnesses taken on August 2, 1979, at the Grand Jury Room, Federal Building, 500 Quarrier Street, Charleston, Kanawha County, West Virginia.

APPEARANCES: ROBERT B. KING. ESQ.
United States Attorney

E. LESLIE HOFFMAN, III, ESQ.
Assistant United States Attorney

J. TIMOTHY DiPIERO, ESQ.
Assistant United States Attorney

(3) (Witness sworn; 9:57 a.m.)

THEREUPON came

RANDOLPH D. JAMES,

called as a witness, who, having been first duly sworn according to law, testified as follows:

EXAMINATION

BY MR. HOFFMAN:

Q Would you state your name and your occupation?

A Randolph D. James, J-a-m-e-s, Resident Agent in Charge with the Drug Enforcement Administration.

Q And that's in Charleston, West Virginia, is it not?

A Yes.

Q You've appeared previously before the grand jury for presentation of an indictment charging certain individuals with various offences relating to the crash of a DC-6 cargo plane at Kanawha Airport in the early morning hours of June 6, 1979, have you not?

A Yes, I have.

Q Since that time, Agent James, has the Drug Enforcement Administration been conducting a continuing investigation into the events which surround the
(4) crash, particularly as they involved other offences and other individuals in the incident?

A Yes, we have.

Q Would you briefly summarize for the grand jury what investigation steps have been taken since the time of their last meeting to consider the indictments?

A Well, we have — we feel we have located the second Ryder truck that was the subject of a lot of talk. Investigation in Cleveland revealed that Mr. McCafferty, who was indicted earlier, along with others, rented the second Ryder truck in Cleveland.

He rented that truck on a couple of occasions earlier when Mr. Flanigan or Mr. Mechanick, as we know him now, attempted to rent trucks in Charleston. We feel this is probably the sign that they were trying a dry run — in other words, the load was probably supposed to come in earlier and didn't and they did rent it on — they rented a truck on June 3rd of '79, and they brought it back on the 5th and said they needed a larger truck.

Now, during an initial interview of Mr. McCafferty right after the crash, he informed me that he and a second
(5) individual, who he refused to identify, brought the truck, the Ryder truck, to Charleston to pick up the cargo of the airplane, and that they brought two vehicles down — a dark-colored late model Buick and the Ryder truck.

In interviewing the people in Cleveland at the Ryder Rental Agency, they verified the fact that Mr. McCafferty, whom they knew as George Markos, and a second individual, when they came on the 5th to rent the truck were, in fact, driving a dark late model Buick.

Q Has your investigation revealed whether or not a George Markos exists?

A Yes. We hve determined that George Markos does, in fact. exist. George Markos is the brother of McCafferty's girlfriend. Her name, I believe, is Rebecca Markos.

Q All right, sir. go ahead.

A We have obtained all the records, copies of all the records from the rental of the trucks. We have information at this time that probably the second individual who came down with Mr. McCafferty did escape. We do not have him identified as yet.

Q That is based, of course, on the fact that the Ryder rental truck was turned back in —

(6) A Right.

Q — to the agency in Cleveland. Is that correct?

A Yes, it was turned in while Mr. McCafferty was still in jail. We believe they stayed at a motel in Ripley, West Virginia. The gentleman or lady who was driving the Ryder truck and went back - returned back to Ripley to a Best-Western Motel, and then from there placed phone calls to some of our people and then from there drove or returned back to Cleveland, apparently returned the truck.

Q Now, you say "some of our people". You mean other individuals who are suspected of involvement in this activity?

A Right. This is another area of investigation we have pursuing.

We have, as you are aware, obtained the telphone toll records for people, the people that were indicted and also others. This is an attempt to identify the other people, the other people involved in the conspiracy.

These toll records have not only — in analyzing them, we have not only been able to tie our defendants to
(7) each other through phone calls — in other words, in the beginning we had so many people arrested here and, as you rememer, we had four arrested in Montgomery who knew nothing about the airport, and we had some arrested at the airport.

Through their telephone toll records, we have been been able to show that people in Montgomery arrested in the truck did, in fact, know people at the airport.

An interesting point, too, is we have been able to identify other people. In other words, an individual unknown to us, well, for example, in Boca Raton, Florida, all of a sudden we are finding his telephone number on a toll record of, say, an individual, one of the defendants up at the airport. And then we're also finding his toll — him being called — calls between his phone and the telphone of the people arrested in Montgomery and also the telephone of Mr. Jim Chadwick and Mark Chadwick. Telephone calls way back in early — in the early part of the year.

Q So as a result of this subpoenaing of the phone records prior to the last indictment, you have been able to identify other subjects which are involved or potentially involved in these activities, is that correct?

(8) A Very much so.

Q To your knowledge, as a result of that telephone use and involvement we have found to be revealed in the phone calls, I believe there has been a decision made to attempt prosecution for offences not charged in the current pending indictment — that is, use of a wire communication faciity in furtherance of a narcotics enterprise. Is that correct?

A That's true, yes.

Q Go ahead. Do you have anything else for the grand jury?

A Those are the two main areas where we have been able to make some investigative headway.

I think one of our biggest steps so far has been that we have definitely been able to not only prove that there were other people involved in this, but also have, we feel, at least tentatively identified these people. And we are, of course, gathering evidence against these people.

I'm sure that, if we ever are able to get to the bottom of it completely, that we will find that there were a lot more people involved in it than what we have now.

(9) MR. HOFFMAN: Before I ask you for questions, I should caution you that what Mr. James has just told you is a summary of certain steps that he and other agents under his direction have taken since the time of your last meeting on this subject.

You shouldn't regard it as evidence of any other commissions of offences, certainly by the individuals under indictment because that isn't the purpose, of course, of the investigation.It's to identify other persons and other offences involved in the same transaction.

You all will be hearing next week evidence, presentation evidence, in summary form much as you have heard this, identifying other individuals and other offences, which have been brought out as a result of this continuing investigation.

You shouldn't consider what Mr. James has just told you in summary form as evidence of — in other words, evidence that would go toward probable cause of anybody else's involvement in these facts.

But do you all have any questions for Agent James as to what has been going on since the last time you met?

(10) (No response.)

MR. HOFFMAN: Thank you, Randy.

(Witness excused; 10:08 a.m.)

* * * * * * * * * * * * *

REBECCA MARKOS

(19) was called as a witness and, after being first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. DiPIERO:

Q State your name, please.

A Rebecca Markos.

Q Rebecca, you were subpoenaed, as you know, to

(26) testify before the Grand Jury last week.....

hours of June 6, 1979. Did you receive a phone call from your boyfriend Greg McCafferty?

A Yes, I did.

Q Would you explain that to the ladies and gentlemen of the Grand Jury?

A Okay. It was about 2:00 in the morning, middle of the night, and the phone rang, and I answered it, and it was Greg and he said, "I have bad new, Babe, I'm busted." And that was it. He hung up.

Q What did you do in response to that call?

A Well, I was upset. I didn't know the nature of the call really. So I called Craig's house. I figured if anyone could tell me what was going on, that it would be him.

He wasn't home. His girlfriend answered the phone. And she said — she sounded like she didn't know what was going on. She told me to hang up, that she wanted to leave the line open, and that she would get back to me.

(27) And she didn't call back. So I called her back, and she just said to maintain and she would be in touch with me, that she didn't know anything.

And I called her back again about 8:00 in the morning, and she said that she believed that Greg was in jail. She said, "He's okay, but I think he's in jail."

Q Again, by Greg, we're talking about Greg McCafferty?

A McCafferty, yes.

Q And by Craig's girlfriend, you mean Karen, last name you don't know?

A Right.

Q Did you make a further inquiry the next morning?

A Pardon me?

Q Did you call her the next morning as well, on June 6, the early morning hours of June 6?

A Yes. That's when she told me that she thought he was in jail.

(28) Q Okay. Did there come a time that you had a conversation with Craig McGilvray?

A Yes.

Q How did that occur?

A I had been calling — I was in Columbus at school at the time. And my finals were over, and I came home,

and I'd been calling trying to get hold of Craig, and he called me back — I called him at a pay phone — he gave me this number to call him at a pay phone — and I called him and met him at a Sambo's Restaurant.

Q Did you find that unusual that you would be calling him at a pay phone?

A Yes. He's an unusual fellow though.

Q In what way?

A Just things like that.

BY MR. KING:

Q Was this still the same day?

A No, no. This was a few days later. Did I confuse you?

(29) Q I just wasn't clear. You said that you were in Columbus.

A I was in Columbus and then my finals were over. I came home to Cleveland —

Q When were your finals over and when did you come home?

A The 6th, the evening of the 6th.

Q The evening of the 6th, June 6?

A Yes.

Q Go ahead.

BY MR. DiPIERO:

Q When you first called on the night after Greg McCafferty had called you, and when you first called Craig McGilvray's house, was Craig there?

A No.

Q Did you inquire if he was there?

A No, Well, I said, "Is Craig home?" She said, "No." I didn't say, "Where is he?" or anything like that.

Q Okay. Now, I would like to direct your attention to Sambo's. Did you in fact meet at Sambo's?

(30)

A Yes.

Q Approximately when?

A Oh, gosh. Approximately — I came home on the 6th. The 10th. The 9th or 10th. I'm not sure.

BY MR. KING:

Q Do you remember what day of the week it was?

A No.

BY MR. DiPIERO:

Q What was the substance of that conversation with Craig McGilvray?

A He told me that there had been a plane crash and he told me that he was there.

Q He was where?

A He was in Charleston when the plane crashed. He said he was in a Ryder rental truck and when the plane crashed, that he got out of there, he hid the truck behind a building, and got in his pickup truck, which was there, and drove around and looked for people that had gotten away, he was going to pick them up.

(31)

He said he couldn't find anyone and that he went back and got the truck, the Ryder truck, and drove it back to Cleveland.

Q Did he say what kind of building he hid the Ryder truck behind?

A A big building.

Q Did he say who he was looking for specifically?

A No.

Q Did you understand that to mean Greg McCafferty that he was looking for as well as other people?

A Yes.

Q Did you talk about Greg during that conversation?

A I asked him about it. He was real hesitant to tell me anything really. After this happened, no one said too much — no one said anything.

(32) Q With the exception of Craig at Sambo's?

A Right.

BY MR KING:

Q Did Craig tell you how he got to Charleston to where the plane crashed?

A No.

Q Did he tell you who traveled with him to Charleston?

A No, sir.

Q Did he tell you how many people traveled with him to Charleston?

A No, sir.

Q Did he tell you where the building was where he hid the Ryder truck?

A No. He said just a big building. He hid it back there.

Q Did he tell you where he had gotten the Ryder truck?

A No. Well, he returned it in Cleveland. He didn't say where he got it.

Q He told you he had returned it in Cleveland?

(33) A Yes. Well, he said, "I drove it back home and returned it."

Q Did you make any inquiries as to how he got a Ryder truck and a pickup truck —

A No. No.

BY MR. DiPIERO:

Q Rebecca, now I'd like to ask you a few questions about and direct you attention to a time in Columbus when Greg McCafferty visited you with a Ryder truck.

Can you explain what occurred with respect to Greg's visit, why he had the truck and that sort of thing?

A Do you want me to go into the whole story?

Q Please.

A Okay. He came down, he hadn't called and told me he was coming, and he had a big Ryder rental truck.

Q About how big would you say it was?

(34) A Oh, pretty big. Maybe — the trailer was about as big as this room, as long as this room.

Q About 20 feet long?

A Approximately.

I had to go to class, and I came back — I had been on vacation in Florida a week or so before that, and when I was in class, he found some photographs of me in Florida with some people that we had met down there and he got upset. He's very jealous.

And I came home and he was just infuriated. So he says, "Come on," and we got in the truck and we returned the truck. We had been arguing the whole time.

I'm sorry — you asked me before why I didn't ask him why he had this big truck. It was weird, but we just returned it, and the truck was rented in my brother's name.

Q Which is what?

A George Markos.

(35) Q How do you know that it was rented in your brother's name?

A I saw the — I was with him when he returned it.

BY MR. KING:

Q Where did he return it?

A He returned it, first of all, to just like a you-rent-em place and they wouldn't accept it and we went to the main dispatch place in Columbus.

Q For Ryder trucks?

A Yes.

Q This Ryder truck wasn't a tractor-trailer, wasn't it?

A No. You mean it didn't have like a hookup to pull it?

Q Right.

A No. It was all connected.

BY MR. DiPIERO:

Q Had you had conversations with Greg relative to bringing in marihuana into the country prior to this time?

(36) A Yes.

Q Could you explain that, please?

A He was always talking about things like that. I never took him seriously. He was — I'd say dreamer, but that's what he was, he always had big ideas and things like that.

Q What kind of things?

A Well, things like a ranch, you know, a horse ranch, and bringing marihuana into the country and making a lot of money, and things like that.

Q How often would he discuss these kinds of things?

A Oh, not constantly, not all the time. Now that I think of it, he had mentioned it, but I never took him seriously until i saw the truck.

Q Then you did understand that truck had some particular purpose?

A Oh, yes.

Q Did you confront him with that?

(37) A Yes.

Q What did he say?

A He said they were going to use it to bring marihuana but for some reason, they couldn't.

Q Did he give a reason why it wasn't going to be used on this particular occasion?

A He said it was raining where they were going to get it from, rainy season he said.

Q What did that mean to you?

A I assumed that it was raining and they didn't want to — I don't know. I assumed a plane and that they didn't want to land a plane if they couldn't get out.

BY MR. KING:

Q You said "they".

A Well, I knew it wasn't Greg alone.

Q Who else —

A He never mentioned any other names before that.

BY MR. DiPIERO:

(38) Q Did he say where they were going to take this marihuana?

A No, sir. Where they were going to take the marihuana?

Q Yes.

A After they got it here?

Q Yes.

A Oh, I'm sorry. Yes. He said they were going to take it to a farmhouse.

Q How many farmhouses do you know that Greg knows?

A Just one.

Q Whose is that?

A Craig McGilvray's.

Q Where is that?

A Lodie, Ohio.

Q Did he say from what country or state that they were going to obtain the marihuana?

A No, sir.

Q Did you have a particular belief or understanding?

A I thought Columbia.

(39) Q When he referred to rainy season, what did that mean to you?

A South America.

Q Rebecca, to the best of your recollection, when is the last time you spoke to Greg McCafferty prior to the airplane crash and his call saying that he was busted?

A It was about four days prior to that.

Q And what was the substance of that conversation?

A He called and said he was in Miami and that — he said they were fixing an airplane and getting ready to go. And I said, "Do whatever you want to do, I don't care." I wasn't particularly pleased to be talking to him at the time anyhow. I was upset with him. He just said they were fixing a plane to go.

Q And what did you understand this to mean?

A That they were fixing the plane to go?

Q Yes.

(40) A That's it. To go to pick up marihuana. Sure.

Q Are you ware, Rebecca, that Greg McCafferty provided a police officer, when he was arrested, a driver's license containing the name of George Markos?

A Yes.

Q Can you explain, to the best of your knowledge —well, first of all, how do you know that that occurred?

A He told me.

Q Greg told you?

A Yes.

Q After he was arrested?

A Yes.

Q And to the best of your knowledge, can you explain how Greg McCafferty got your brother's driver's license?

A Greg's license had been suspended for a traffic violation. I don't know actually what. And he didn't have
(41) a driver's license. So my brother George gave him his. They look a lot alike. He gave him his license to use.

Q And what did you brother do with respect to getting a license?

A I think he reported that license stolen and got him a new one.

Q How long did Greg McCafferty have your brother's license?

A Oh, I don't know. Approximately a year or a year and a half.

Q So he had had it for some time prior to his arrest?

A Oh, yes.

Q Where did Greg McCafferty grow up?

A Across the street from me.

Q Across the street from your house?

A Yes.

Q On what street was that?

A Michael Drive.

Q And what street did you grow up on?

A Larkfield Drive. Corner of Larkfield and Michael.

(43) Q What about Craig McGilvray?

A Down the street.

Q On Michael Drive?

A Yes.

Q Do you know an individual by the name of Jerry Lill?

A Yes.

Q How did you come to know Jerry Lill?

A I first met him — he was dating a girl that I work with.

Q At Markell's?

A Yes. And he was friends of my brother and Greg also. I didn't see them together often but I knew they were acquaintances.

Q Where was he staying —

A — when I met him?

Q Yes.

A I don't know.

Q Where did you meet him?

A At the restaurant I believe. Yes.

(44) Q Did you know where he was staying during the last few months?

A The last few months now?

Q This past year.

A He was staying in Lodie since this accident.

Q Have you been to Lodie since the plane crash?

A Yes.

Q At Craig McGilvray's farm?

A Yes.

Q For what reason?

A We went there the night Greg got out of jail.

Q Who's "we"?

A My brother, Greg, myself, and Craig and Karen were already out there.

Q By Craig, you mean Craig McGilvray?

A McGilvray.

Q And Karen —

A And I don't know her last name.

(45) Q And that's Craig's girlfriend?

A Yes.

Q Did you discuss the events on the night of June 5 and June 6?

A No, sir. Nobody wanted to talk about it We were having a cookout and Greg was out of jail and nobody said anything.

Q How do you know that Jerry Lill is now residing at Craig McGilvray's farm in Lodie, Ohio?

A I had been out there another time when he was there.

Q This is, again, since Greg returned for that first party that you-all had?

A Yes.

Q Is there anything else that I haven't asked you about that either we've discussed or that you would like to advise the ladies and gentlemen of the Grand Jury?

A Not really.

BY MR. KING:

Q Ms. Markos, where does your brother work?

(46) A Markell's Restaurant.

Q He's involved in the restaurant?

A Yes.

Q How old is he?

A 24.

Q How old is Craig McGilvray?

A Oh, approximately 27 or 28.

Q What does Craig McGilvray look like?

A Short, blonde hair, kind of fat.

Q By blonde hair, is it long hair, short hair, straight hair, curly hair?

A Oh, I'm sorry. Straight hair. Kind of shaggy. Blonde.

Q How short?

A Just touches his collar.

Q How short is he?

A Oh, I'm sorry.

Q My fault.

A Gosh, I don't know. Five-six, five-seven.

Q Does he keep dogs?

(48) it with your brother George?

A No, sir.

Q Where is George now?

A On vacation.

Q Where?

A Don't know.

Q How long has he been on vacation?

A A week and a half.

Q When was it that you returned the Ryder rental truck in Columbus? I know it was after you went to Florida.

A Yes.

Q Using that as a frame of reference, when was it?

A Early May

Q Do you know a man by the name of Donald Weills?

A Yes.

Q Where does he live?

A Lodie.

Q Lodie, Ohio?

(52) people that were arrested?

A Yes.

Q Did you recognize any of the other names besides Jerry Lill?

A No.

Q And Greg McCafferty.

BY MR KING:

Q You talked about a Ryder truck that Craig came to Columbus with.

A No. Greg.

Q Right. Greg came to Columbus with a Ryder truck in early May —

A Yes.

Q — and returned it in Columbus and you were with him.

A Yes.

Q And that's the one you said had been rented in your brother's name and wasn't going to be used because it was raining.

A Right. But my brother didn't rent the truck.

(53) Q It was rented by Greg.

A Yes.

Q I understand. But, now, that was a different truck than the one you talked to Craig about —

A Right.

Q — after the plane crashed.

A Right.

Q Okay. When you talked to Craig at Sambo's three or four days after the plane crashed, he told you about a Ryder truck that he had had in Charleston, West Virginia.

A Yes.

Q Is that right?

A Right

Q That he had had a Ryder truck in Charleston, West Virginia, at the time the plane crashed —

A Right.

Q — and he told you that he had returned that

(54) Ryder truck in Cleveland, Ohio, is that correct?

A Right.

Q Do you recall Greg being in Florida sometime in May?

A Yes, sir.

Q Did he call your apartment?

A He called my apartment all the time.

Q Collect?

A Yes.

Q And that's the apartment in Columbus at Ohio State University that you maintain with Mary Koons?

A Right.

Q The phone is in Mary Koons' name?

A Right.

Q So the phone calls from Florida to you collect are from Greg McCafferty?

A Yes.

Q And there are several of them. I've seen the phone
(55) records. From I believe the 9th or 10th of May through I believe the 15th or 16th of May.

A Well — everyday.

Q That would be Greg McCafferty calling you?

A Yes.

Q Do you know where he was in Florda?

A No, sir. He didn't say.

Q He didn't say?

A I didn't ask him. He said he was recuperating. He had fallen 45 feet at work. He's an ironworker. And he was in the hospital for three days. He was in intensive care for three days and he got out and went to Florida.

Q And he recuperated?

A Yes.

Q But you don't know where he was recuperating?

A No.

Q Or who he went to Florida with?

(56) A No.

BY MR. DiPIERO:

Q Have you talked to Greg McCafferty since the plane carsh —

A Yes.

Q — about what he was doing here in Charleston?

A He said he was here — it's very sketchy, everything he told me. After this happened, he didn't want to tell me anything. But he said he was here and there was a plane crash and he had fallen, he went to help people and he had fallen down an embankment and he had a broken collar bone, and he said that's how he broke it.

Q He had go to help some people?

A Yes.

Q In the plane itself?

A Yes.

Q Did he indicate how he had got to Charleston?

(57) A No, sir.

Q Did he tell you he had come down in a Ryder truck for instance?

A No.

Q But did he indicate that he was not on the plane?

A He never said he was on the plane, no.

Q But the inference was, from the fact that he had gone to help people, was that he was not on the plane itself?

A Right.

Q Becky, you testified, to the best of your memory, that Greg came down with the Ryder truck to Columbus, Ohio, during the first week of May.

A Approximately.

Q Right.

A But when he said the phone calls from Florida were the 10th, that's when I started to say well, maybe it wasn't then.

Q That's the question.

(58) BY MR. KING:

Q Can you put in the context of when he went to Florida? Was it before or after that?

A To be perfectly honest with you, no.

Q You can't say whether it was before or after?

A No.

Q That's okay. Fine.

BY MR. DiPIERO:

Q Did Greg comment about the plane crash itself?

A He said it was very terrible, very scary.

Q He said that on several occasions to you?

A Yes.

BY MR. KING:

Q What did McGilvray, to your knowledge, do for a living?

A I've always been told that he's in real estate.

(59) Q Do you know the name of his real estate company?

A No.

Q Did you ever ask him what he did to support himself?

A No.

BY MR. DiPIERO:

Q Do you understand him to be in the drug business, illegal sale of drug business?

A I just said, "What's going on?" He called me up. We just had breakfast. I think he wanted to assure me
(61) that Greg was all right. He knew that's what my main concern was. That he was all right.

Q You didn't inquire about what happened or what was going on?

A Oh, yes. I said "What happened?" and he said a plane came in and it crashed into the side of the mountain and he said he got out of there. He was in a Ryder truck.

Q He didn't say what was in the plane or —

A I knew it was marihuana. It had already been in the paper, on the news.

BY MR. DiPIERO:

Q Becky, did he say what route he took home or what cities he went through?

A He went through Athens, Ohio. That's the only name he mentioned. He stopped in Athens he said and had a drink when he crossed the Ohio border.

BY THE GRAND JURY:

Q Does he have his pickup truck back now or have you seen it since the plane crash?

(62) A Yes.

BY MR. DiPIERO:

Q Where did you see it?

A I saw it in Lodie.

BY MR. KING:

Q Was he driving it that morning at Sambo's?

A No. I didn't notice what he was driving. He met me there. He lives close to Sambo's. He could have walked.

Q Does he have other automobiles or vehicles?

A No, I've never seen any.

Q Just a truck?

A Just a truck.

Q Does it have any writing on the side of it?

A No. It's just beat up.

BY MR. DiPIERO:

Q What does McCafferty drive?

A He drives an old '60-something Chevelle. It's a puke green.

Transcript of Grand Jury Testimony, August 10, 1979

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

At Charleston

Re: Grand Jury Proceedings

Criminal Matter No. 79-0366

August 10, 1979

APPEARANCES:

ROBERT KING
United States Attorney

E. LESLIE HOFFMAN
Ass't. U. S. Attorney

TIMOTHY DI PIERO
Ass't. U. S. Attorney

(8) MR. HOFFMAN: Ladies and gentlemen, the proposed indictment that we have before you today to consider is one that includes several of the defendants in the previous case that you considered involving the crash of a DC-6 cargo plane at Kanawha County Airport on June 6, 1979.

I'd like to go over the indictment for you. It does charge some additional defendants and involves some additional or varied charges with some of the already indicted defendants.

The proposed indictment charges that:

"1. That for an unknown period of time up to and including the 6th day of June, 1979, at Charleston, Kanawha County, West Virginia, and within the Southern District of West Virginia, and elsewhere, Breck Dana Anderson, David Thomas Seesing, Jerome Otto Lill, Mark Douglas Chadwick, James F. Chadwick, Craig
(9) Bruce McGilvray, Russell Kook, also known as Russell Cook, Gregory Louis McCafferty, also known as Greg Jack and as George T. Markos, Shahbaz Shane Zarintash, Leon Jacques Gast, Marshall Mechanik, also known as Michael Patrick Flanagan, and Steven Henry Riddle, the defendants, did wilfully and knowingly combine, conspire, confederate and agree together and with each other and with divers other persons, whose names are to the Grand Jury unknown, to commit offenses against the United States, that is:

"a. To unlawfully, knowingly, intentionally and without authority possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1);

"b. To travel in interstate and foreign commerce n, management, establishment and carrying on of an unlawful ctivity, that is, a business enterprise involving a controlled substance, in violation of Title 18, United
(10) States Code, Section 1952(a)(3);

"c. To import into the customs territory of the United States from a place outside thereof a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a); and

"d. To use a communication facility, that is, the telephone, in committing, causing and facilitating the commission of acts constituting felonies under the provisions of subchapters I and II of Title 21, United States Code, in violation of Title 21, United States Code, Section 843(b).

"2. It was a part of this conspiracy that the defendants and co-conspirators would and did use communication facilities, that is, telephones, in interstate and foreign commerce between various points within and without the United States of America, including but not limited to New York City and other points in the State of New York; Boca Raton, Daytona Beach, Hollywood,
(11) Miami, and Sarasota in the State of Florida; Parma and Cleveland in the State of Ohio; Madison in the State of Wisconsin; Spartanburg in the State of South Carolina; Waco in the State of Texas; and Belle, Charleston, Parkersburg and Ripley in the State of West Virginia, in committing, causing and facilitating the commission of violations of the Drug Control statutes of the United States.

"3. It was further part of this conspiracy that defendants Mark Douglas Chadwick and James F. Chadwick, acting under color of their office, that is, each being a Deputy Sheriff of Kanawha County, would and did arrange with their close friend, defendant Shahbaz Shane Zarintash, to do the following:

"(a) Provide a safe and secure place to land a DC-6 aircraft carrying a contraband cargo at the Kanawha
(12) County Airport near Charleston, West Virginia;

"(b) Provide a safe and secure place for the aforesaid DC-6 aircraft to be unloaded at the Kanawha County Airport near Charleston, West Virginia; and

"(c) Provide the defendants and co-conspirators with a safe departure from the airport.

"4. It was part of this conspiracy that defendants Breck Dana Anderson, David Thomas Seesing and Jerome Otto Lill would travel in interstate and foreign commerce, via a DC-6 aircraft, from points outside the United States to a point within the United States, that is, Charleston, Kanawha County, West Virginia, by following a flight plan that included San Marcos in Columbia, South America; Kingston in Jamaica; Inagua

in the Bahama Islands; Fayetteville and Greensboro in the State of North Carolina; and Pulaski in the State of Virginia.

"5. It was further part of this conspiracy that the aforesaid DC-6 aircraft would carry as contraband cargo approximately 20,000 pounds (ten tons) of marihuana, a
(13) Schedule I non-narcotic controlled substance.

"6. It was further part of this conspiracy that during the early morning hours of the 6th day of June, 1979, defendants Breck Dana Anderson, David Thomas Seesing and Jerome Otto Lill would land the aforesaid DC-6 aircraft at the Kanawha County Airport near Charleston, West Virginia.

"7. It was further part of this conspiracy that defendants Craig Bruce McGilvray, Russell Kook, also known as Russell Cook, Gregory Louis McCafferty, also known as Greg Jack and as George T. Markos, Shahbaz Shane Zarintash, Marshall Mechanik, also known as Michael Patrick Flanagan, Leon Jacques Gast, Steven Henry Riddle and others unknown to the Grand Jury, would travel in interstate commerce from points outside the State of West Virginia to the Kanawha County Airport near Charleston, West Virginia, with intent to meet the aforesaid DC-6 aircraft and receive the aforesaid contraband cargo which it carried.

(14) "8. It was further part of this conspiracy that defendants Mark Douglas Chadwick, Craig Bruce McGilvray, Russell Kook, also known as Russell Cook, Gregory Louis McCafferty, also known as Greg Jack and as George T. Markos, Shahbaz Shane Zarintash, Leon Jacques Gast, Marshall Mechanik, also known as Michael Patrick Flanagan, and Steven Henry Riddle would be at the Kanawha county Airport near Charleston, West Virginia, in the early morning hours of the 6th day of June, 1979, to meet the aforesaid DC-6 aircraft and receive the contraband cargo which it carried."

Overt acts are:

"9. In order to further the objects and purposes of the aforesaid conspiracy, the defendants and co-conspirators did commit the following and other overt acts:

"a. On or about the 19th day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Cleveland, Ohio.

(15) "b. On or about the 19th day of April, 1979, a phone call was made from Daytona Beach, Florida, to Cleveland, Ohio.

"c. On or about the 20th day of April, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

"d. On or about the 21st day of April, 1979, defendant Marshall Mechanik, using the name Michael Patrick Flanagan, rented a Ryder rental truck in Charleston, West Virginia.

"e. On or about the 23rd day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Daytona Beach, Florida.

"f. On or about the 24th day of April, 1979, defendant Leon Jacques Gast received a phone call.

"g. On or about the 26th day of April, 1979, defendant David Thomas Seesing received as phone call.

"h. On or about the 27th day of April, 1970, a phone
(16) call was made from Fern Creek, Kentucky, to Cleveland, Ohio.

"i. On or about the 27th day of April, 1979, defendant David Thomas Seesing received a phone call.

"j. On or about the 28th day of April, 1979, a phone call was made from Cleveland, Ohio, to Hollywood Beach, Florida.

A I don't know that for a fact.

Q Has that been your understanding for sometime however?

A I don't like to speculate about them too much.

BY MR. KING:

Q Has anybody ever told you that?

A Come right out and told me that? No.

Q When you say that McCafferty commented that it was very terrible, he still did not indicate that he was on the plane to you, is that correct?

A That's correct.

(60) BY THE GRAND JURY:

Q The one that drove around in the pickup truck, was it his pickup truck or someone else's?

A He said it was his truck.

Q What kind of truck does he have?

A A small pickup truck.

Q Do you know what color it is?

A Tan.

BY MR. KING:

Q Do you know the model? Is it a Ford, Chevrolet or do you know?

A No. It's beat up.

Q Does it hve a camper on the back?

A Sometimes it does and sometimes it doesn't.

BY THE GRAND JURY:

Q You met Craig at Sambo's. What did you have to say to him at that time?

k. On or about the 28th day of April, 1979, defendant Marshall Mechanik, using the name Michael Patrick Flanagan, rented a Ryder rental truck in Charleston, West Virginia.

"l. On or about the 28th day of April, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

"m. On or about the 29th day of April, 1979 a phone call was made from Daytona Beach, Florida, to Hollywood Beach, Florida.

"n. On or about the 3rd day of May, 1979, a phone call was made from Daytona Beach, Florida, to Waco, (17) Texas.

"o. On or about the 3rd day of May, 1979, a phone call was made from Daytona Beach, Florida, to Cleveland, Ohio.

"p. On or about the 5th day of May, 1979, a phone call was made by defendant Leon Jacques Gast to Hollywood Beach, Florida.

"q. On or about the 5th day of May, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

"r. On or about the 5th day of May, 1979, defendant Marshall Mechanik, using the name Michael P. Flanagan, traveled to Charleston, West Virginia.

"t. On or about the 18th day of May, 1979, defendant Steven Henry Riddle made a telephone call.

(18) "u. On or about the 22nd of May, 1979, defendant Steven Henry Riddle made a telephone call.

"w. On or about the 2nd of june, 1979, a telephone call was made from Daytona Beach, Florida, to Waco, Texas.

"x. On or about the 3rd day of June, 1979, a telephone call was made from Waco, Texas, to Daytona Beach, Florida.

"y. On or about the 3rd day of June, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio.

"z. On or about the 4th day of June, 1979, defendant Marshall Mechanik, using the name Michael Patrick Flanagan, rented a Ryder rental truck near Spartanburg, South Carolina.

"aa. On or about the 5th day of June, 1979, a phone call was made from Taylorsville, Kentucky, to Cleveland, Ohio.

(19) "bb. On or about the 4th day of June, 1979, defendant James F. Chadwick received a phone call from near Spartanburg, South Carolina.

"cc. On or about the 5th day of June, 1979, in Cleveland, Ohio, defendant Gregory Louis McCafferty, using the name George T. Markos, exchanged the Ryder rental truck which he had rented on June 3, 1979, for a larger Ryder rental truck.

"dd. On or about the 4th day of June, 1979, defendants Marshall Mechanik, Shahbaz Shane Zarintash, and Leon Jacques Gast traveled from near Spartanburg, South Carolina, to near Charleston, Kanawha County, West Virginia.

"ee. On or about the 5th day of June, 1979, defendant Steven Henry Riddle made a telephone call.

"ff. On or about the 5th day of June, 1979, defendants Craig Bruce McGilvray, Russell Kook, and Gregory Louis McCafferty, traveled from near Cleveland, Ohio, to Ripley, Jackson County, West Virginia.

(20) "gg. On or about the 5th day of June, 1979, defendant Russell Kook, using the name Russell Cook, registered at a motel in Ripley, West Virginia.

"hh. On or about the 5th and 6th days of June, 1979, defendants Breck Dana Anderson, David Thomas Seesing and Jerome Otto Lill traveled on the aforesaid DC-6 aircraft containing approximately ten tons of marihuana from outside the United States, particularly Columbia, South America, to the Kanawha County Airport.

"ii. At approximately 12:15 a.m. on the 6th of June, 1979, defendant James F. Chadwick arrived at the Kanawha County Jail, Charleston, West Virginia.

"jj. At approximately 12:30 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick traveled to the Eagle Aviation Terminal at the Kanawha County Airport.

(21) "kk. At approximately 12:30 a.m. on the 6th day of June, 1979, defendants Gregory Louis McCáfferty, Craig Bruce McGilvray, Russell Kook, Shahbaz Shane Zarintash, Leon Jacques Gast, Marshall Mechanik, Steven Henry Riddle and unknown others traveled to the General Aviation Area of the Kanawha County Airport in two Ryder rental trucks to meet the aforesaid DC-6 aircraft and receive its contraband cargo.

"ll. At approximately 12:40 a.m. on the 6th day of June, 1979, at the Kanawha County Airport, defendant Mark Douglas Chadwick had a conversation with defendant Shahbaz Shane Zarintash.

"mm. In the early morning hours of the 6th day of June, 1979, at the General Aviation Area of the aforesaid Kanawha County Airport, defendant Shahbaz Shane Zarintash possessed radio equipment for the purpose of communicating from the ground to airborne aircraft.

"nn. In the early morning hours of the 6th day of June, 1979, at the Kanawha County Airport, defendant Mark Douglas Chadwick possessed a hand-held communication unit.

(22, "oo. At approximately 12:45 a.m. on the 6th day of June, 1979, defendants Breck Dana Anderson, David

Thomas Seesing and Jerome Otto Lill requested the Control Tower at the Kanawha County Airport to provide landing instructions for the aforesaid DC-6 aircraft.

"pp. At approximately 12:53 a.m. on the 6th day of June, 1979, defendants Breck Dana Anderson, David Thomas Seesing and Jerome Otto Lill attempted to land the aforesaid DC-6 aircraft at the Kanawha County Airport.

"qq. At approximately 1:00 a.m. on the 6th day of June, 1979, defendant James F. Chadwick received a telephone call at the Kanawha County Jail, Charleston, West Virginia.

"rr. At approximately 1:05 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick advised the defendants and unknown others in the aforesaid Ryder rental trucks that their plane had crashed and that
(23) their cargo was all over the hillside.

"ss. At approximately 1:05 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick aided the flight of the defendants and unknown others in the aforesaid Ryder rental trucks from the premises of the Kanawha County Airport.

"tt. At approximately 1:10 a.m. on the 6th day of June, 1979, defendant James f. Chadwick arrived at the scene of the crash of the aforesaid DC-6 aircraft.

"uu. At approximately 1:10 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick falsely advised the Kanawha County Sheriff's Defendant and its personnel that he was on Greenbrier Street and proceeding to the airport, when, in fact, he was then present at the Kanawha County Airport.

"vv. From approximately 12:53 a.m. until approximately 2:07 a.m. on the 6th day of June, 1979, defendant
(24) Mark Douglas Chadwick intentionally withheld from law enforcement authorities his knowledge of the presence and flight of the two Ryder rental trucks and their occupants from the Kanawha County Airport.

"ww. At approximately 2:07 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick falsely advised the Kanawha County Sheriff's Department and its representatives that he had observed one Ryder truck containing one white male; and

"xx. Other overt acts;

All in violation of Title 18, United States Code, Section 371."

The remainder of the indictment —— the proposed indictment that is —— that is, Counts 2 through 12 contain what are called substantive counts for violation of nonconspiracy laws of the United States. Those violations are set forth primarily in the conspiracy count that I have just recited to you.

(25) I will briefly outline the charges You—all have copies of the indictment before you. You'll be able to refer to the charges in the indictments before making your decision as to whether or not probable cause exists as to return an indictment in this case.

Count 2 of the indictment charges defendants Anderson, Seesing and Lill with importing into the United States from a place outside the United States approximately 20,000 pounds of marihuna which is a violation of Section 952(a) and Section 2. They are charged together as aiders and abetters.

The third count charges Anderson, Seesing and Lill aided and abetted by each other with traveling from points outside the State of West Virginia and the United States, that is, Columbia, South America, to Charleston, West Virginia, with the intent and purpose to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an
(26) unlawful activity, that is, a business enterprise involving marihuana, a Schedule I non-narcotic controlled substance, in violation of Title 18, United States Code, Sections 1952 (a)(3) and 2.

1952 is commonly referred to as the Travel Act. It prohibits interstate or foreign travel by persons engaged in or attempting to be engaged in unlawful activities in violation of the laws of the United States.

The fourth count charges defendants Anderson, Seesing and Lill, aided and abetted by each other, with the unlawful possession with intent to distribute a controlled substance, that is, the 20,000 pounds of marihuana which was the cargo on the DC-6 aircraft.

As you will note in Count 4, they are charged with possession of that cargo here in Kanawha County on the 6th day of June.

The fifth count charges that on the 4th day of June, the defendant James F. Chadwick did knowingly and
(27) intentionally use a communication facility, that is, the telephone, to receive and transmit information between the Southern District of West Virginia, at a point near Spartanburg, South Carolina, in committing, causing and facilitating the commission of acts violating the drug control acts of the United States, which is a violation of Title 21, United States Code, Section 843(b).

The sixth count of the indictment charges Gregory Louis McCafferty, one of the defendants in this case, with a violation of the Travel Act in that he traveled from a point near Cleveland, Ohio, to a point near Charleston, West Virginia, for the purpose of facilitating the promotion, management, establishment and carrying on of the unlawful business involving marihuana.

The seventh count charges Russell Kook with traveling from that same point near Cleveland to a point near Charleston in Kanawha County in violation of 1952.

(28) The eighth count charges the defendant Bruce McGilvray with a violation of 1952, he traveling from the same point near Cleveland to Kanawha County on the day before the airplane crash.

The ninth count charges the defendant Zarintash with traveling from outside the State of Virginia, including the points of New York City, and from Spartanburg, South Carolina, with intent to promote and carry on the illegal business, the marihuana business, a violation of 1952.

The tenth count charges Michael Mechanik with a violation of 1952 in that he traveled from near Spartanburg, South Carolina, to near Charleston, West Virginia, again with the intent to promote, carry on or facilitate the business enterprise involving marihuana.

The eleventh count charges the defendant Gast with traveling, a 1952 violation, from points outside West Virginia, including New York City and Spartanburg,
(29) South Carolina.

The twelfth count charges the defendant Steven Henry Riddle with the Travel act violation. He traveled, it is alleged, from points outside the state, including Taylorsville, Kentucky, to a point near Charleston, West Virginia, with an illegal purpose, in violation of Title 18, United States Code, Section 1952.

Before I get into a factual basis for the plea, and I'd like to ask you—all if you have any questions just on the charges —— Tim is going to give you in a few minutes briefly what the law is on these matters, and what you must consider before finding probable cause that a violation of the law has occurred.

But do you have any questions on the charges themselves before I start the factual basis for the charges?

JUROR: On Count 5, the charge against James Chadwick, is it strictly on the basis of using the telephone?

(30) MR. HOFFMAN: Right.

JUROR: Is there evidence to back any of that up on that?

MR. HOFFMAN: Yes, sir. You'll get that information when the agents present the factual basis for the entire indictment.

JUROR: Now, the three that have been added to this are James Chadwick and Riddle —

MR. HOFFMAN: No, sir. Riddle was an original defendant. We have added McGilvray and Russell Kook, also known as Cook.

JUROR: Now, James Chadwick, he's the father, right?

MR. HOFFMAN: That's right. He's the father of Mark Chadwick.

JUROR: Mark was the one that was directing them at the airport, right?

MR. HOFFMAN: That's right?

JUROR: His father was the one making the telephone calls?

MR. HOFFMAN: Well, you'll hear what the evidence
(31) is in a minute from these agents.

Yes, he was the one that received the telephone call down here at the jail right after the crash.

Whereupon,

JERRY RINEHART and RANDOLPH JAMES were called as witness and, after being first duly sworn, were examined and testified as follows:

MR. HOFFMAN: I wonder, Agent James and Agent Rinehart, if you'll both state your full names for the record, please.

MR. RINEHART: Jerry Allen Rinehart.

MR. JAMES: Randolph D. James.

MR. HOFFMAN: I believe you both have been sworn before commencing this questioning, have you not?

MR. RINEHART: Yes, sir.

MR. JAMES: Yes.

MR. HOFFMAN: And you have both been present
(32) during my recitation of the charges contained in the proposed indictment charging several defendants with violations of the laws of the United States. Is that also correct?

MR. RINEHART: Yes, sir.

MR. JAMES: Yes, sir.

MR. HOFFMAN: I believe both of you are special agents with the Drug Enforcement Administration of the Department of Justice stationed here in Charleston, West Virginia, is that correct?

MR. RINEHART: That's correct.

MR. JAMES: That's correct.

MR. HOFFMAN: In that capacity, do both of you possess knowledge and knformation and belief concerning the facts and circumstances related to the crash of a DC-6 cargo plane in the early morning hours of June 6, 1979?

MR. RINEHART: We do.

MR. JAMES: Yes.

MR. HOFFMAN: Have you both been engaged in the investigation and development of that case since the time of the occurrence of the crash?

(33) MR. RINEHART: I have.

MR. JAMES: Yes.

MR. HOFFMAN: Are both of you then familiar with the facts and circumstances that are detailed in the proposed indictment that's just been recited to the members of the Grand Jury?

MR. RINEHART: Yes, sir.

MR. JAMES: Yes, sir.

MR. HOFFMAN: Agent Rinehart, I believe you will begin.

MR. RINEHART: I was going to start with paragraph 4 of the conspiracy.

The first thing that needs to be explained is the difference in the San Marcos that we alleged in the first indictment and the San Marcos alleged in this indictment.

In the first indictment, we had alleged that this was the San Marcos that we had thought had went to (indicating on map).

(34) MR. HOFFMAN: That is the San Marcos in Guatemala?

MR. RINEHART: Yes. Where we got this was from some burnt flight plans that we had found on the last day of our cleanup at the airport.

We had several other cities that were mentioned but nothing related to San Marcos and the reason we thought this was due to the fact that the plane had a Nicaraguan registration to it, and we felt that this was the area they had went to in order to pick up the load and then disembark and return to the Charleston area, not knowing at this time which direction they would have flown in.

At a later date, after meeting with the FAA officials, we determined that they had departed from somewhere in this area (indicating) on their flight down. This was due to the number of miles that we found on the flight plans.

(35) They went to the Inagua Islands, they hit off this beacon here and went to the Jones Inland intersection. They shot off the Jones Intersection, directly for San Marcos, South America, which is in Columbia, South America.

The last thing that they had on their flight plan was 80 miles 120 degrees which would put them in a southerly direction traveling for a period of 80 miles at 120 degrees right along the river on the other side of the mountains somewhere along this point.

MR. HOFFMAN: I'd like the record to reflect that Agent Rinehart is testifying using a map which depicts North America, Central America, and northern South America, including, of course, West Virginia points in between and the country of Columbia.

Go ahead.

MR. RINEHART: We feel that they had departed this area somewhere around 4 p.m. our time that same day, on June 5. They flew directly back coming the same route heading off the same beacons from their flight route.

They had a target time at Carolina Beach at 10:45 p.m. that night, which would put them exactly in here,
(36) right around 12:50 p.m., and they crashed right at 12:56 p.m. They had overshot the runway one time, which would have delayed them a few minutes circling the runway and coming back.

But the flight plans at Carolina Beach at Pulaski, had Beckley, and from Beckley to the Charleston airport is exactly 42 miles and that is what they had on their flight plan, a total of a little better than 1800 miles, which would take them 9.5 hours to fly 102 miles an hour to this point (indicating) and to this point to make a landing time in here at 12:56, which is the time they crashed.

MR. HOFFMAN: That is from the point in Columbia to the point in Charleston.

MR. RINEHART: That would be sometime — 4 p.m. our time, crashing at 12:56 p.m. Our time.

JUROR: Does that plane have enough fuel to take off from Miami and go all the way down and go back to Charleston?

MR. RINEHART: It would have from this point (indicating) to Charleston and directly on into Canada. Whether the distance from this point down here and then back, whether he could make it or not, I don't know. It
(37) might be pressing it a little bit too far.

JUROR: So they have had to fuel somewhere possibly.

MR. RINEHART: We feel that when they departed from here (indicating) and flew down, they had enough fuel to fly to this area, possibly refueled, and returned here. We feel that they refueled somewhere in this area (indicating).

MR. HOFFMAN: We have no proof of that though.

MR. RINEHART: Not at this time. It would be awfully tough to fly out of here on a dirt strip with 20,000 pounds of marihuana loaded in a DC-6. We don't feel they flew off of just any normal airport. We feel they flew out of a dirt strip. With a full load of fuel and 20,000 pounds, that would be pretty difficult to get all the way back up here (indicating).

JUROR: Was this picked up going down or coming back?

MR. RINEHART: They departed here (indicating), went down, flew 80 miles 120 degrees southeast of San
(38) Marcos, and we feel they picked it up somewhere right in here (indicating), picked it up and returned on June 5.

Now, we don't know when they flew down. It might have been some days prior to June 5. I don't believe so. But it could have been right close to that time. Maybe they arrived there that day, picked it up and returned at the same time.

JUROR: How much flying experience did the licensed pilots aboard that plane have?

MR. RINEHART: Dana Anderson is a known drug

violator, smuggler. He was arrested for smuggling in Morocco, spent I think approximately one year in Tangier's prison in Morocco.

He was also arrested right outside of Bogota, Columbia, I believe sometime in 1974, and spent like eight months in prison, six to eight months in prison here.

MR. HOFFMAN: You-all should not consider his previous arrests or previous incarceration in determining his involvement or whether there is probable cause that he committed these acts, however.

(39) MR. RINEHART: He did have a multi-engine rating, in other words, to fly the plane.

JUROR: You don't know how many hours or anything like that?

MR. RINEHART: No.

MR. JAMES: The way you would determine their hours is from their last medical. I think David Seesing was the pilot who probably had the best credentials for flying. He had ratings in addition to what Anderson had.

I believe his hours of flight time were quite a bit more than Anderson's. I would have to check the records on that to make sure.

But I think his records outweighed Anderson's or his credentials.

MR. HOFFMAN: Agent Rinehart, is there anything else you would like to clear up before we go into the overt acts?

MR. RINEHART: Okay.

MR. HOFFMAN: Let's go through the overt acts beginning with paragraph 9. The overt acts will show how it was part of the conspiracy, the charges in paragraphs 1 through 8.

(40) Do you-all have questions about paragraphs 1 through 8 before we begin in the overt acts?

(No response)

MR. HOFFMAN: Agent Rinehart, do you want to begin?

MR. RINEHART: Overt act (a) reads, "On or about the 19th day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Cleveland, Ohio."

Our investigation determined that Jerome Otto Lill resided at the address of Willard Taylor in Fern Creek, Kentucky.

He had provided this telephone number subsequent to the time he was arrested, the telephone number listed to Willard Taylor in Kentucky.

He made a call on that day to a Mr. Greg Jack who we later determined to be Greg McCafferty, who is a defendant in the indictment.

Greg Jack is the born name of Greg McCafferty. That was his first father before he was deceased and then remarried.

MR. HOFFMAN: You say he made a phone call to Greg Jack. Do we know who the phone call was made to
(41) specifically?

MR. RINEHART: No. We do know the phone is listed to Greg Jack. The residence is owned by Craig McGilvray.

Now, during the entire investigation, we determined that Greg Jack, or Greg McCafferty, being the same person, Craig McGilvray and Jerome Lill have resided at this address.

MR. HOFFMAN: And that is the address in Cleveland, Ohio?

MR. RINEHART: That is Cleveland, Ohio, but on the telephone records, it is listed as Parma, Ohio, a suburb of Cleveland.

MR. HOFFMAN: Let me explain something to you at the outset, and this will help you in your understanding of the way the indictment is charged.

In telephone calls such as those set forth in overt act (a), we know that there was a phone call from a co-conspirator at Fern Creek, Kentucky, to another co-conspirator, a potential defendant, in Cleveland, Ohio.

We do not know the exact identity of those co-
(42) conspirators at this time, but, by looking at the phone calls and realizing the clusters of calls around the other events involved in the case, we feel, and we have embodied our feeling in the proposed indictment, that there is probable cause to believe that these phone calls were made in the furtherance of the conspiracy.

Where the phone calls are charged to — such as in overt act (g) on the next page, page 5, where it was charged that a specific defendant received a phone call, the defendant co-conspirator, we have evidence only that that specific co-conspirator defendant resided at that telephone number, or where that telephone number was located.

Therefore, we have stated specifically that that individual received a phone call from another one of the co-conspirators.

Any questions?

JUROR: Who are you charging?

MR. HOFFMAN: Well, we will explain the conspiracy law to you in a minute. Overt acts are acts that can be as innocent as walking across the street or riding up and down in an elevator. It does not have to be a criminal act per se.

(43) But the act must be done in furtherance of a conspiracy. Ordinarily, a telephone call between two individuals is an innocent act, but, if the phone call is made for the purpose of facilitating the conspiracy or promoting

the conspiracy, then it is an overt act in furtherance of the conspiracy.

And there must be a commission of at least one overt act by at least one of the charged co-conspirators in order for you-all to find that a conspiracy existed.

The overt acts of each of the co-conspirators is imputed, carried over, to all of the co-conspirators, the charged co-conspirators, if you find that the other fellows were a part of the conspiracy.

Tim is going to explain that to you further in a little bit. But let's go through this now and go through what is charged here and we will explain the law to you later.

Go on with (b).

MR. RINEHART: "On or about the 19th day of April, 1979, a phone call was made from Daytona Beach, Florida, to Cleveland, Ohio."

Again, this information was obtained through our
(44) toll record and subscriber information checks through telephone companies.

It was determined that the number at Daytona Beach, Florida, was listed to a Mr. Sanderson who runs a floral shop in that area and who rents that residence to a Russell Kook and a Nick Powers.

And that residence has been rented to Russell Kook and Nick Powers for the past two years.

The phone call was made from, we believe, Russell Kook to, again, the Cleveland residence of Craig McGilvray, which the phone is listed to Greg Jack, in which all three — McCafferty, McGilvray, and Lill — have resided at this residence.

MR. HOFFMAN: I believe, Agent Rinehart, that an analysis of the telephone tolls of the Sanderson number in Daytona Beach reveals numerous calls by and between various of the defendants charged in the indictment, is that correct?

MR. RINEHART: That's correct. We have calls from the Sanderson number, where Kook and Powers reside, to several of the defendants alleged in the indictment.

MR. HOFFMAN: Go ahead with (c).

(45) MR. JAMES: "On or about the 20th day of April, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio."

As you are aware, I traveled to Cleveland, interviewed people at the Ryder Truck Rental Company's district office on Brook Park Road in Cleveland, and, in reviewing their records for trucks rented to a George T. Markos, we determined that a George T. Markos had rented trucks, or a truck, a Ryder truck, from them on April 20, 1979.

There was a rental agreement in file reflecting the rental of a truck on that date. An employee of that company who rented the truck to Mr. Markos identified a photograph which was presented in what we call a photo spread, a series of photos, identified a photo of George McCafferty as being the individual who had come in and rented the truck using the name George Markos.

MR. RINEHART: If you will notice from that overt act, then you have a time period of April 23 through April 28 where there are several telephone calls made shortly after the rental of that truck.

(46) Overt act (e) reads, "On or about the 23rd day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Daytona Beach, Florida."

MR. JAMES: There is a second rental of a truck in overt act (d) which I will cover before we get to the phone calls.

Overt act (d) reads, "On or about the 21st day of April, 1979, defendant Marshall Mechanik, using the name Michael Patrick Flanagan, rented a Ryder rental truck in Charleston, West Virginia."

We went to the Ryder Rental Company in Charleston, West Virginia. It is called Automotive Leasing and it is in Kanawha City. And an employee there advised us, told us that who we know as Mr. Mechanik and she knew as Mr. Flanagan had requested a truck from her for a one-day usage for himself to New Jersey.

This truck was never picked up. She has at a later date had an opportunity to meet with Mr. Flanagan or Mr. Mechanik. She has identified a photograph of Mr. Mechanik as being Mr. Flanagan.

MR RINEHART: Again from (e) through (l), we have
(47) several phone calls made during a short period of time, between April 23 and April 28.

The first one, (e), is, "On or about the 23rd day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Daytona Beach, Florida." That is another call from Jerome Otto Lill to Sanderson's residence, again which was rented by Kook and by Powers.

Overt act (f) reads, "On or about the 24th day of April, 1979, defendant Leon Jacques Gast received a phone call."

This is the first time you have seen Gast's name listed in the phone calls. This was from Sanderson's phone in Daytona Beach, and this was on his toll records, to Leon Gast at his residence in New York City.

Are you still with me on that? That was from Daytona Beach to Leon Gast in New York City, called directly to his number listed to him.

Overt act (g) reads, "On or about the 26th day of April, 1979, defendant David Thomas Seesing received a phone call."

This was from Sanderson again at Daytona Beach directly to David Seesing's residence in Cape Girardeau, Missouri.

(48) Overt act (h) reads, "On or about the 27th day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Cleveland, Ohio.

Again, this was a phone call from Lill to Greg Jack's phone in Parma or Cleveland, Ohio.

Overt act (i) reads, "On or about the 27th day of April, 1979, defendant David Thomas Seesing received a phone cal[1]

This was another phone call from Sanderson's residence, again where Kook and Powers reside, to Seesing's residence in Cape Girardeau, Missouri.

Overt act (j) reads, "On or about the 28th day of April, 1979, a phone call was made from Cleveland, Ohio, to Hollywood Beach, Florida.

This is the first time that Hollywood Beach has come into the picture as far as the overt acts. This was from Cleveland, which was Greg Jack's telephone number to a number at the Howard Johnson Motel, room number 722, which was registered to a Mr. Francis Sevoy. This is the same telphone number, or one of the telephone numbers, that was found on the person in the phone book of Dana Breck Anderson after his arrest on the night of the crash.

(49) What you've got is a call to Howard Johnson's at Hollywood Beach to a Mr. Sevoy and the same number in Dana Breck Anderson's phone book found in his possession at the time of the crash.

MR JAMES: Overt act (k) reads, "On or about the 28th day of April, 1979, defendant Marshall Mechanik, using the name Michael Patrick Flanagan, rented a Ryder rental truck in Charleston, West Virginia.

As you recall, a moment ago, I explained that an employee of the Automotive Leasing Company in Kanawha City had identified a photograph of Mr. Mechanik as being the individual she knew as Flanagan.

On April 27, 1979, she had an opportunity to meet Flanagan, or Mechanik, when he appeared personally at their offices. At that time, the employee told Mr. Mechanik that he could pick the truck up on the following day, which is April 28, 1979. He did not pick that truck up on that date.

Overt act (l) reads, "On or about the 28th day of April, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio."

Again, going back to my visit to Cleveland, when we
(50) reviewed the records, we found two incidents where trucks had been rented. Actually, there were three incidents where trucks were rented from the company's district office, and that is on Brook Park Road in Cleveland.

The third occasion was on April 28, 1979, and, again, McCafferty was identified as the individual who rented a truck on that date using the name George T. Markos.

MR. RINEHART: Going to overt act (m), "On or about the 29th day of April, 1979, a phone call was made from Daytona Beach, Florida, to Hollywood Beach, Florida."

This is directly from Sanderson's toll records reflecting a call again to the Howard Johnson Motel, room number 722, listed to Mr. Frances Sevoy. There are several calls continued through the indictment, the overt acts in the indictment, where we have calls to this motel room from several of the defendants and calls from this motel room to several of the defendants.

So you should keep this in mind, because we will be
(51) jumping back and forth from one defendant to the other.

Overt act (n) reads, "On or about the 3rd day of May, 1979, a phone call was made from Daytona Beach, Florida, to Waco, Texas."

This was from the Sanderson phone in Daytona Beach to David Seesing, his address in Waco, Texas. What you've got is two addresses now for David Seesing, the one in Cape Girardeau and the one in Waco, Texas, and he is receiving calls at both locations. David Seesing is the pilot on the plane.

Overt act (o) reads, "On or about the 3rd day of May, 1979, a phone call was made from Daytona Beach, Florida, to Cleveland, Ohio."

This, again, is a call from Sanderson, the residence of Kook, to Craig Jack in Parma, Ohio, Greg Jack being Gregory McCafferty.

Overt act (p) reads, "On or about the 5th day of May, 1979, a phone call was made by defendant Leon Jacques Gast to Hollywood Beach, Florida."

Now you've got Mr. Gast calling the Howard Johnson Motel to the room of Mr. Sevoy in Hollywood Beach, Florida, on this date.

(52) MR. JAMES: Overt act (q) reads, "On or about the 5th day of May, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio."

As I told you before, we had rentals from the district office. They had some trouble with Mr. McCafferty using the name Markos and so, when he called to attempt to rent a truck on an additional date, they told him they didn't have any available. He therefore went to one of their franchise — you have the district office in Cleveland and then you have like service stations, this type of a company, which will pick up a franchise, and rent Ryder trucks and, of course, all of these rentals go through the district.

So, with this in mind, we went through the records at the district office for the various franchise, and we were able to locate a Seaway Arco Company at 2980 St. Clair Avenue in Cleveland, and we were able to find two rental agreements for George T. Markos.

We went through the service station to see whether Arco interviewed the owner of the gas station or the manager, and he was familiar with Mr. Markos and he
(53) identified a photograph of Mr. McCafferty as being the individual he knew as Mr. Markos.

He told us that he remembered an additional date when a truck was rented. So we went through his records and we came up with a receipt for a rental agreement for a truck which was rented on May 5 of 1979 by Mr. McCafferty using the name, again, Mr. Markos.

Overt act (r) reads, "On or about the 5th day of May, 1979, defendant Marshall Mechanik, using the name Michael P. Flanagan, traveled to Charleston, West Virginia."

In going through some of the telephone information that Agent Rinehart has discussed, we found there were telphone calls from one of the defendants to a Charleston number.

In getting the subscriber information on that number, we found that it was to one of the Holiday Inns in Charleston. We went to that Holiday Inn and reviewed the records of that Holiday Inn and determined that on April 15, 1979, and April 21, 1979, Mr. Flanagan was in Charleston. He was in Charleston on those two dates.

(54) As to the May 5 date, this is covered in the rental agreement.

MR. RINEHART: This was a rental agreement from the main office where it disclosed Mechanik had rented the truck under the name of Michael Flanagan on May 5, 1979, under rental agreement number N357842.

Overt act (s) reads, "On or about the 7th day of May, 1979, defendant Leon Jacques Gast received a phone call from Daytona Beach, Florida."

Again, this was from Sanderson's toll records where Kook resides directly to Leon Gast at his residence in New York.

Overt act (t) reads, "On or about the 18th day of May, 1979, defendant Steven Henry Riddle made a telephone call."

This was from Mr. Riddle's residence and this is the first time that Riddle has come into it as far as the telphone calls. This was a residence where his girlfriend resided and the phone is listed in her name, and her name is Patricia Diehl.

He had also provided this address and this telephone number at the time of his arrest, and through her
(55) telphone toll records, it disclosed that Steven Riddle had made a phone call on that day to Greg Jack at the Parma, Ohio, number, in Cleveland, Ohio.

Overt act (u) reads, "On or about the 22nd day of May, 1979, defendant Steven Henry Riddle made a telephone call."

And that was from Riddle directly to Sanderson's residence in Daytona Beach, Florida, where, again, Kook resides. So what you've got on the 18th and 22nd is you've got two separate telephone calls, one to Greg Jack in Parma, Ohio, and then he turns around on the 22nd and Riddle calls Sanderson's residence where Russell Kook resides in Daytona Beach, Florida.

There was also a return call that is not mentioned in the overt acts that we deleted. It was a call from Sanderson's residence directly to Riddle on the same day, May 22. We do have a telephone toll record in relation to that telephone call but it is not in your overt acts. But it is on the same day.

You have one of them calling — you've got Riddle calling directly to Sanderson and then Sanderson turned around and called back to Riddle.

(56) Overt act (v) reads, "On or about the 26th day of May, 1979, defendant Steven Henry Riddle made a telephone call.

And then this was the same telephone call from him to Sanderson's residence in Daytona Beach, Florida.

Overt act (w) reads, "On or about the 2nd day of June, 1979, a telephone call was made from Daytona Beach, Florida, to Waco, Texas.

This is another call from Sanderson's residence in Daytona Beach directly to David Seesing's residence in Waco, Texas.

Overt act (x) reads, "On or about the 3rd day of June, 1979, a telephone call was made from Waco, Texas, to Daytona Beach, Florida.

This is a turn-around call from David Seesing to Sanderson's residence, him trying to get hold of Russell Kook in Daytona Beach, Florida, from Waco, Texas.

MR. JAMES: Overt act (y) reads, "On or about the 3rd day of June, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio."

(57) This rental was, again, made from Seaway Arco. Mr. McCafferty was using the name George T. Markos in renting the truck from the Seaway Arco. It was an 18-foot truck, a little smaller than he wanted.

He did rent the truck, he did take the truck from the Seaway Arco on that day.

Overt act (z) reads, "On or about the 4th day of June, 1979, defendant Marshall Mechanik, using the name Michael Patrick Flanagan, rented a Ryder rental truck near Spartanburg, South Carolina."

You heard testimony earlier concerning the rental of that truck. According to the testimony, Mr. Flanagan, Mr. Mechanik using the name Mr. Flanagan, came into his service station which was located on Interstate 26, rented the truck and made arrangements to pick it up that evening, or the evening of the 4th.

He did, in fact, come in on the evening of the 4th, early evening, somewhere between 5:00 and 5:30, 6:00 o'clock, and picked up the truck.

MR. RINEHART: Overt act (aa) reads, "On or about the 5th day of June, 1979, phone call was made from Taylorsville, Kentucky, to Cleveland, Ohio."

(58) This, again, is from the phone listed to Pat Diehl, the girlfriend of Steven Riddle, directly to Greg Jack's phone number in Parma, Ohio.

Overt act (bb) reads —

MR. HOFFMAN: Before that, I would like to refer you-all to Count 5 of the indictment. That is on page 11.

The overt acts, the evidence contained in the overt act (bb), which Jerry is about to present, is also the basis for the fifth count of the proposed indictment.

Do you-all see that?

Go ahead, Jerry.

MR. RINEHART: Overt act (bb) reads, "On or about the 4th day of June, 1979, defendant James F. Chadwick received a phone call from near Spartanburg, South Carolina."

As Mr. James just testified, on overt act (z), on June 4, Mechanik in Spartanburg, South Carolina, rented the truck. On that same date, just a few minutes afterwards, he drove approximately four or five miles away from that rental agency, went to a pay phone and called James
(59) Chadwick at his telephone number in Charleston, West Virginia.

Mr. Zarintash, at the time of his arrest, also relted that he had been in Spartanburg, South Carolina, during that period of time, at which time they were shopping for antiques and alleged that that is what he was doing up here in that Ryder truck the night of the arrest.

Also you have Leon Jacques Gast who was making third-party telephone calls, several of them, from the Spartanburg, South Carolina, area at that time to several of the other defendants in this case.

MR. HOFFMAN: Does everybody know what a third-party call is? That is when you pick the telephone up and dial the operator and say, "I'd like to place a call but charge it to another number." That's when you're calling from one number to another number and charging it to a third number.

The third number was the Gast residence in New York.

JUROR: The one he called Chadwick's residence, from Spartanburg, if he called from a pay phone, how did he trace it?

MR. HOFFMAN: It was a collect call.

(60) MR. JAMES: I'd like to add that that phone call was placed from a telephone which was on the same interstate as the place where he rented the truck. It would have been the next exit — in other words, there is the exit, Mr. Clifford's exit, where they are on — I believe it is I-26, where they rented the truck.

If you were to travel up one more exit, four miles up, there is a pay phone at a service area gas station, and that is the pay phone that the call was made from to Jim Chadwick.

MR. RINEHART: So that is where we believe Mechanik probably, in the presence of Gast and Zarintash, stopped, placed the call to Jim Chadwick from that pay phone.

JUROR: Did they call his home?

MR. RINEHART: Called his residence. That is directly from that pay phone to Jim Chadwick's residence in Charleston, West Virginia.

MR. JAMES: Overt act (cc) reads, "On or about the 5th day of June, 1979, in Cleveland, Ohio, defendant Gregory Louis McCafferty, using the name George T. Markos, exchanged the Ryder rental truck which he had
(61) rented on June 3, 1979, for a larger Ryder rental truck."

You will notice in overt act (y) it says that he rented the truck on June 3. We say up here that he rented it on the previous day. The manager of the Seaway Arco and the rental agreement reflected that the vehicle was returned on the 4th.

In other words, Mr. McCafferty rented the vehicle on the 3rd, returned it on the 5th. The rental agreement that he signed shows that it was rented — that it was returned on the 4th. I believe that they were closed one of the days and, in order that he would not be charged for the extra day which he had to hold the truck, the owner of the company just changed the date so he showed that he returned it on the 4th where, in fact, McCafferty came in on the 5th and exchanged the truck for a 22-foot truck.

He had an 18-footer and he exchanged it for a 22-footer on the 5th of June, 1979.

MR. HOFFMAN: Before we go on, would you-all like to take a short break and then go on with this?

(Short recess)

(62) MR. HOFFMAN: All right. Mr. Rinehart and Mr. James, after our short break, I wonder if you would continue presenting the basis for probable cause with overt act (dd).

Before you do that, I direct the Grand Jury's attention to Counts 9, 10 and 11 of the indictment over on pages 13 and 14 of the proposed indictment.

The factual basis for overt act (dd) is also the basis for those three substantive counts in Counts 9, 10 and 11.

MR. JAMES: Overt act (dd) reads, "On or about the 4th day of June, 1979, defendants Marshall Mechanik,

Shahbaz Shane Zarintash, and Leon Jacques Gast traveled from near Spartanburg, South Carolina, to near Charleston, Kanawha County, West Virginia.

We know that they were in Spartanburg. Agent Rinehart has already explained to you how we know that each of them was in Spartanburg, and we know that they traveled to Charleston where, on the following day, of course, their truck was stopped after the crash.

MR. HOFFMAN: You will recall that Mr. Mechanik
(63) was in Spartanburg and we know that because he rented a truck down there and was later arrested with the truck up here in Montgomery.

Mr. Zarintash, in a statement made to officers at the time of his arrest, stated that he was in Spartanburg. He stated that he had been there for the purpose of looking at some antiques, however, and the defendant Gast we know was in Spartanburg because of the third-party telephone calls billed to his residence in New York, numerous third-party telephone calls billed to his residence in New York, from Spartanburg.

JUROR: Do we know that they traveled together?

MR. HOFFMAN: We don't know they traveled together but we know that they all three did travel because they all ended up here in Charleston.

MR. RINEHART: Overt act (ee) reads, "On or about the 5th day of June, 1979, defendant Steven Henry Riddle made a telephone call."

This was another call from Pat Diehl's listed phone in Kentucky directly to Greg Jack's phone in Parma, Ohio.

(64) MR. HOFFMAN: Before (ff) is presented, I would like to direct your attention to Counts 6, 7 and 8 of the indictment.

The factual basis for overt act (ff) is also the basis for the charge in Counts 6, 7 and 8 of the proposed indictment.

Go ahead.

MR. RINEHART: Overt act (ff) reads, "On or about the 5th day of June, 1979, defendants Craig Bruce McGilvray, Russell Kook, and Gregory Louis McCafferty, traveled from near Cleveland, Ohio, to Ripley, Jackson County, West Virginia."

We know this. You will recall that you had Rebecca Markos, a young lady from Cleveland who dated Greg McCafferty, who testified in reference to his conversation with Craig McGilvray at Sambo's Restaurant in Cleveland, at which time he told her that he had, in fact, traveled with a Ryder truck from the Cleveland area and also someone had driven his pickup truck from the Cleveland area to Charleston, West Virginia, and was here at the time of the plane crash.

On Russell Kook, we have — and I think it can better
(65) be explained through the motel receipt at McCoy's Motor Lodge in Ripley, West Virginia, which is a Best Western Motor Lodge directly off of Interstate 77 there at Ripley. We will pass this around for you to look at.

You can see where Russell Kook had registered under the name of Cook — C-o-o-k — but at the time he wrote his name down, he started to write K-o-o-k, which is the correct spelling for his name.

He then decided not to write the K-o-o-k and he wrote his name and registered under C-o-o-k.

MR. HOFFMAN: This is the same Russell Kook we believe that rents the residence in Daytona Beach, Florida, where all the telephone activity is in and out of, by and between the various conspirators and defendants.

MR. RINEHART: Also on the registration slip, it has the street address, 3923 Clare Street, Cleveland, Ohio. Okay?

We, through all of our record-checking, determined that there is not a 3923 Clare Street in Cleveland, Ohio,

but that Russell Kook did, in fact, reside at — I believe it
(66) was 3928 Clare Street, Madison, Wisconsin, which is his address in Wisconsin.

MR. HOFFMAN: Our investigation has determined I believe, has it not, Agent Rinehart, that Mr. Kook maintains residence in Daytona Beach, Florida, and in Madison, Wisconsin.

MR. RINEHART: That's correct. Like I testified before, he has resided at Mr. Sanderson's residence in Daytona Beach, Florida along with Nick Powers, for the past two years.

He also has a residence we determined in Madison, Wisconsin, on this Clare Street address, and we feel that what he did, when he checked into the Best Western Motel in Ripley, West Virginia, that all he did was just deviated just a small amount on the numbers and put Clare Street, Cleveland, Ohio.

MR. HOFFMAN: While I am passing this around, before we begin overt act (gg), I believe, in regard to (ss), Gregory Louis McCafferty made a certain statement upon his arrest in this case, did he not?

MR. RINEHART: That's correct. He had provided information to Mr. James in reference to the fact that he, in fact, had traveled from Cleveland, Ohio, to Charleston,
(6. West Virginia, that day, and was in the Ryder truck which was seized subsequent to the arrest.

(gg) is more or less self-explained by looking at the motel receipt. It states, "On or about the 5th day of June, 1979, defendant Russell Kook, using the name Russell Cook, registered at a motel in Ripley, West Virginia."

As you will look at the motel receipt, you can see how he started to write "K" in place of the "C" and changed it to the C-o-o-k.

Mr. James: Overt act (hh) reads, "On or about the 5th and 6th days of June, 1979, defendants Breck Dana

Anderson, David Thomas Seesing and Jerome Otto Lill traveled on the aforesaid DC-6 aircraft containing approximately ten tons of marihuana from outside the United States, particularly Columbia, South America, to the Kanawha County Airport."

MR. HOFFMAN: Before Randy begins providing the basis for that overt act, I direct your attention to Counts 2, 3 and 4 of the indictment.

The factual basis for this overt act, that is overt act (hh), also provides the basis for the charges in the proposed Counts 2, 3 and 4 of the indictment.

(68) MR. JAMES: As you recall, on the night of the crash, June 6, or thereabout, at 12:56 a.m., Breck Dana Anderson was met by Lt. Perry a short distance from the crash scene. Lt. Perry was providing traffic control at the area of the crash, and Breck Dana Anderson, who had suffered severe injuries, including burns, was met by him and, if you recall Lt. Perry's testimony, Breck Dana Anderson made certain admissions to him concerning the crash.

Mr. Seesing and Mr. Lill — again, as you recall, they were picked up sometime later on the same day, a few hours later, by Deputy Stone, Larry Stone, the Kanawha County Sheriff's Department, again in the vicinity of the airport, a short distance from where the crash occurred. They had sustained severe injuries.

As was explained by Agent Rinehart, at the time of the crash, we found a flight chart which, based on the interpretation of that, the plane flew from a point in Columbia, which was pointed out by Agent Rinehart, on a direct route into the United States, and into Charleston, West Virginia, Kanawha County Airport.

(69) MR. HOFFMAN: On (ii), what is the basis for the overt act there?

Many of the overt acts from this point on are overt acts that you have previously seen and considered. They

are overt acts that were contained in the indictment that you-all considered and returned before arising out of the same circumstances.

So the factual basis for these following overt acts, except for the defendant James Chadwick, will be dealt with very lightly by the agents and very briefly unless you-all have questions about them.

MR. JAMES: As you recall earlier, on the 5th, the evening of the 5th, James Chadwick had been to the airport, traveled from the airport, and later went to the Sheriff's Department where, according to testimony from the sheriff's personnel, he notified personnel on duty that he was expecting a very important phone call on the telphone line which rings into his office, and to make sure that that line was kept open so that there wouldn't be any problem with him receiving this important phone call.

(70) He remained at the Sheriff's Department waiting for the call, and he was present to witness the activities of the people on duty at the Sheriff's Department.

Overt act (jj) reads, "At approximately 12:30 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick traveled to the Eagle Aviation Terminal at the Kanawha County Airport."

Mark Chadwick, in his statement to me, admitted that he traveled to the airport at approximately that time and on that date and went to the vicinity of the Eagle Aviation Terminal, as he put it, to more or less hide —that wasn't the term he used — shamming, as he called it — so that it would appear he was on duty so he wouldn't have to go to work early the next morning was his explanation for his presence up there.

MR. RINEHART: Overt act (kk) reads, "At approximately 12:30 a.m. on the 6th day of June, 1979, defendants Gregory Louis McCafferty, Craig Bruce McGilvray, Russell Kook, Shahbaz Shane Zarintash, Leon Jacques Gast, Marshall Mechanik, Steven Henry Riddle and

(71) unknown others traveled to the General Aviation Area of the Kanawha County Airport in two Ryder rental trucks to meet the aforesaid DC-6 aircraft and receive its contraband cargo."

Going back through how we know that each individual traveled to the general aviation area, Greg McCafferty admitted to Agent James, subsequent to his arrest, that he had traveled in a Ryder truck down there.

Craig Bruce McGilvray admitted that he was there and had driven one of the trucks to the crash site to Rebecca Markos. That was her testimony before you just the other day.

Russell Kook we believe was one of the other individuals who had driven one of the trucks, or a pickup truck, to the general aviation area.

Russell Kook is also the same one who had checked into the Ripley Motel. Shahbaz Shane Zarintash was arrested in one of the trucks that was seen there at the general aviation area later that night in Montgomery, West Virginia.

Leon Jacques Gast was also arrested in that same truck along with Zarintash. Marshall Mechanik ws not only arrested in the truck, but he is the one who had
(72) rented the truck previously.

And this truck was the same truck that was seen there at the general aviation area by Lt. Wiseman from Pinkerton, by Rob Thomas, one of the employees of Eagle Aviation.

MR. HOFFMAN: And Steven Henry Riddle was also arrested?

MR. RINEHART: That's correct. Riddle was arrested inside the truck in the Montgomery, West Virginia, area, subsequent to the plane crash.

Overt act (11) reads, "At approximately 12:40 a.m. on the 6th day of June, 1979, at the Kanawha County

Airport, defendant Mark Douglas Chadwick had a conversation with defendant Shahbaz Shane Zarintash."

This was testimony that you heard directly from Rob Thomas, the employee of Eagle Aviation, who observed Mark Chadwick walk over and talk directly to Shane Zarintash.

It was also information provided to you by Lt. Wiseman who testified that he had also observed Mark Chadwick go over and speak to the individual standing there at the corner of the Aviation Building and conversed
(73) with him at that time, who we later learned or determined was Shahbaz Shane Zarintash.

MR. JAMES: Overt act (mm) reads, "In the early morning hours of the 6th day of June, 1979, at the General Aviation Area of the aforesaid Kanawha County Airport, defendant Shahbaz Shane Zarintash possessed radio equipment for the purpose of communicating from the ground to airborne aircraft.

As you recall from the testimony of the officers, at the time of their arrests, or at the time they were stopped in Montgomery, West Virginia, they were found to be in possession of a Nebco air-to-ground radio, or a Nebco portable radio, which is used primarily for transmission from ground or from any portable unit. It is a portable unit. From actually any location to aircraft or to air traffic controllers

MR. RINEHART: Overt act (nn) reads, "In the early morning hours of the 6th day of June, 1979, at the Kanawha County Airport, defendant Mark Douglas Chadwick possessed a hand-held communication unit."

We know this from information received from Deputy Larry Stone of the Kanawha County Sheriff's Department who observed Deputy Chadwick with the hand-held unit.

(74) You also heard Lt. Wiseman testify that he also observed Deputy Chadwick with the hand-held unit.

Robin Chadwick came in and also testified to the fact that Mark Chadwick had stated to her that he was keeping in touch with them through the hand-held unit and we believe, when he said "with them", that he was talking in the context of the people at the airport, general aviation area.

MR. JAMES: Overt act (oo) reads, "At approximately 12:45 a.m. on the 6th day of June, 1979, defendants Breck Dana Anderson, David Thomas Seesing and Jerome Otto Lill requested the Control Tower at the Kanawha County Airport to provide landing instructions for the aforesaid DC-6 aircraft."

MR. HOFFMAN: We knew all three of them were on the plane. We do not know specifically who requested it, requested the landing instructions. Obviously, only one of them did. It is a common practice in indictments to charge everyone and just prove one.

That is a jury determination.

(75) Go on to (pp).

MR. JAMES: We have a taped recording of the FAA transmission and —

MR. HOFFMAN: I believe you-all were aware of this when we presented this before, Go ahead.

MR. JAMES: Overt act (pp) reads, "At approximately 12:53 a.m. on the 6th day of June, 1979, defendants Breck Dana Anderson, David Thomas Seesing and Jerome Otto Lill attempted to land the aforesaid DC-6 aircraft at the Kanawha County Airport."

I don't believe that needs any explanation.

Overt act (qq) reads, "At approximately 1:00 a.m. on the 6th day of June, 1979, defendant James F. Chadwick received a telephone call at the Kanawha County Jail, Charleston, West Virginia."

As you recall, Jim Chadwick asked that that line be kept open, that he was expecting a very important phone call, and just at the time the plane was landing or at the time of the crash we know, from information received from the airport personnel, that he did receive a phone call.

We also know, from employees at the airport, that
(76) Mark Chadwick immediately placed a phone call. At the same time that he received the phone call, Mark Chadwick was placing a phone call from the airport.

MR. HOFFMAN: If you recall, when Agent James told you baout Mark Chadwick's statement, Mark Chadwick admitted that he immediately, after the crash, went into the Eagle Aviation Terminal and placed a telephone call.

He said that he had placed it to the command center at the jail down here, but, strangely enough, all three lines were busy, and that he had never known that to happen before.

We believe, based upon all the attendant circumstances here, that he did, in fact, call his father, because his father did, in fact, get a telephone call right after the crash.

MR. JAMES: Just to reenforce this point, we do have sheriff's personnel who have said that, in fact, the call did come in and that Jim Chadwick did receive the call, did go into his office and did take the call and closed the door and took the telephone call.

(77) MR. RINEHART: You also, along those same lines, have Rob Thomas' statement stating that Mark Chadwick, immediately upon the plane crash, stated that he was calling the command center and went into the Eagle Aviation Center and did, in fact, place a phone call, but he could not overhear the conversation.

MR. HOFFMAN: We know that the personnel at the command center did not receive a telephone call or a

report of the plane crash from Mark Chadwick after the plane crashed.

JUROR: The sheriff's personnel, do they identify Mark's voice over the telephone?

MR. HOFFMAN: They would identify them by the officer reporting, of course.

JUROR: If you work for somebody long enough, after a period of time, you should be able to recognize their voice on the phone. I wondered if he called in and said, "Let me speak to James Chadwick," did they recognize his voice?

MR. HOFFMAN: No. James Chadwick answered the phone from the evidence we have.

MR. JAMES: I believe he was told, "Your call has
(78) come in," or something to that effect, but it was something to the effect, "You have received your call," or something, and he went into his office and took the call.

And about that time, it was being reported through other sources that there had been a plane crash. They were attempting to verify the fact of the crash at that time.

MR. RINEHART: Overt act (rr) reads, "At approximately 1:05 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick advised the defendants and unknown others in the aforesaid Ryder rental trucks that their plane had crashed and that their cargo was all over the hillside."

This, again, was testimony from Rob Thomas, the employee of Eagle Aviation, who was there standing on the other side of the truck when Chadwick got out of his vehicle and went over and conferred with the individuals and instructed them on how to get off the hill.

There was also testimony from Robin Chadwick that Mark Chadwick had told her that he had assisted the individuals and talked to them and assisted them in getting off the hill.

(79) JUROR: Going back to (rr), did anybody have any evidence what James Chadwick did after he got his telephone call?

MR. HOFFMAN: It's in (tt).

MR. RINEHART: Overt act (ss) reads, "At approximately 1:05 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick aided the flight of the defendants and unknown others in the aforesaid Ryder rental trucks from the premises of the Kanawha Countyu Airport."

That relates directly back to (rr) where he had stopped, talked to them, told them in a round-about way, "You'd better hurry up and get off the hill, they'll be setting up a roadblock at the bottom of the hill."

That's exactly when the trucks departed. It was observed by Rob Thomas.

You had Lt. Wiseman at the entranceway of the general aviation area who observed, first of all, a Ryder truck come off the hill and turn down the hill coming out of the airport area. The next vehicle was Mark Chadwick's vehicle who also turned down the hill.

(80) The next vehicle was another Ryder truck who had turned up the hill and went toward the main airport terminal.

So you have Mark Chadwick's vehicle in between the two Ryder trucks. This is what Lt. Wiseman, I believe, had testified to you before. And there was a pickup truck that had also turned down the hill, and we believe this pickup truck to be McGilvray's truck from Cleveland that he had told Rebecca Markos that they had brought down here.

MR. JAMES: Overt act (tt) reads, "At approximately 1:10 a.m. on the 6th day of June, 1979, defendant James F. Chadwick arrived at the scene of the crash of the aforesaid DC-6 aircraft.

As you recall, there was testimony that he arrived at the crash scene and then sometime later went up to the airport to the control tower itself looking for individuals who we have not identified at this time.

Overt act (uu) reads, "At approximately 1:10 a.m. on the 6th day of June, 1979, defendant Mark Douglas Chadwick falsely advised the Kanawha County Sheriff's
(81) Department and its personnel that he was on Greenbrier Street and proceeding to the airport, when, in fact, he was then present at the Kanawha County Airport."

You may recall my reading Mark Douglas Chadwick's statement. He admitted that he did advise the sheriff's department that he was on Greenbrier Street.

MR. HOFFMAN: On overt act (vv), you recall the testimony before from the previous presentment, what happened in that regard.

You will recall that he did not inform — that is, Mark Chadwick did not inform the command center of the presence of the Ryder trucks, that he was up there talking with at the airport and the people he had informed earlier that their cargo was over the hill.

On overt act (ww), you will also recall that he stated that he told the command post that he had observed one Ryder truck containing one white male when it came over the air that there may have been some Ryder trucks involved in that. You-all had previously considered that overt act.

Do you have any questions now with the overt act?

(82) (No response)

MR. HOFFMAN: Let me call your attention to Count 12 of the proposed indictment. That is the only count that is not separately accounted for in overt acts.

That count charges Steven Henry Riddle with traveling for the purpose of carrying on, facilitating the carrying on, of a business enterprise involving marihuana.

It charges him with travel from the State of Kentucky to near Kanawha County or Charleston, Kanawha County, West Virginia.

Agent Rinehart, what is the basis for that 12th count of the proposed indictment?

MR. RINEHART: Subsequent to the arrest of Steven Riddle in Montgomery, West Virginia, and him being transported back to the Kanawha County Jail, he was interviewed by myself and an Assistant United States Attorney at the Kanawha County Jail.

At this time, we advised him of his rights. He signed a waiver of his rights. He stated that he didn't mind talking to us.

We inquired how he had gotten to the rear of the
(83) Ryder truck. Mr. Riddle related to us that on that day, June 5, 1979, he had traveled from the Louisville, Kentucky, area, to Ashland, Kentucky, and had interviewed for a job at Ashland Oil with a Mr. Hedricks.

He said that subsequent to the interview with Mr. Hedricks, he was on his return to Louisville, Kentucky, when he stopped at — I believe it was a Chevron service station — to obtain some gasoline, at which time he met two young females, talked to them, and decided to hitch a ride with them to wherever their destination was, and he didn't recall at that time.

He said he proceeded from the Ashland, Kentucky, area, through Huntington, bypassing Charleston, and ended up at an exit off of 77, and he referred to that exit as Ripple, West Virginia, which we believe to be Ripley, West Virginia.

He said he had dinner there with these two young females at the Best Western Restaurant and decided that he would return to Louisville, Kentucky, area, and, at that time, he left the two females in Ripley, West Virginia, walked out to the interstate, began thumbing from that exit back to the Louisville, Kentucky, area, at

(84) which time he was picked up by these individuals in the Ryder truck.

He said he had got into the back of the Ryder truck after explaining to them to drop him off on Interstate 64 so he could proceed west to Louisville, Kentucky.

He said the next thing he knew, he woke up and was being arrested by the State Police and some other police officers in Montgomery, West Virginia, and had no idea who any of the other individuals were, had never met any of the other individuals and had no idea what they had been up to, knew nothing about the plane crash.

And I think through the telephone records of his calls to several of the other defendants, that explains that he did at least know some of the individuals in the truck.

MR. HOFFMAN: Agent Rinehart, let me direct your attention, if I may, to a residence that we have followed closely in our telephone analysis in Boca Raton, Florida.

Are you familiar with that?

(85) MR. RINEHART: I believe that is the residence of Mr. Felix Willims.

MR. HOFFMAN: That's correct. Through an investigation, have we learned the identity of the occupants of the residence of Felix Williams?

MR. RINEHART: Mr. Williams related to us through a telephone interview that he had rented the residence to a Nikini Noschka, and we have determined that this is the same female or the girlfriend of Shahbaz Shane Zarintash.

MR. HOFFMAN: Do our telephone analyses of the toll calls placed from that phone in Boca Raton, Florida, indicate telephone calls to West Virginia if you recall:

MR. RINEHART: Yes, they do.

MR. HOFFMAN: To whose residence if you recall?

MR. RINEHART: To the residence of James F. Chadwick.

JUROR: Who is the guy in Hollywood, Florida?

MR. HOFFMAN: That was the room, if you recall, that was registered to a Frances Sevoy. We would like to know who he is also.

MR. KING: I think there was a subpoena issued —

(86) MR. HOFFMAN: His home address is Buchanan, New York.

MR. KING: But they haven't been able to serve a subpoena on him. That certainly warrants further investigation. I think you would agree with that.

MR. HOFFMAN: Tim will briefly tell you about the law that you are to apply in deciding whether or not probable cause exists in order to return this indictment against these defendants.

MR. DIPIERO: I will try to be very brief. On most of these, of course, you have already heard of elements from the prior presentment of the original indictment. But I know a couple of you had a couple of questions.

One of you had a question about conspiracy. Very briefly, four elements to the conspiracy law. What is charged in Count 1 is, first, that the conspiracy described in that count was willfully formed nad was existing at or about the time alleged.

Second, that each of the accused willfully became a member of the conspiracy.

Three, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place that is alleged in Count 1.

And, fourth, that such overt acts is knowingly in the furtherance of some object or purpose of the conspiracy as charged.

(87) Of course, these we would have to prove beyond a reasonable doubt at trial and here, the test is probable cause.

Conspiracy Travel Act would involve three essential elements.

MR. KING: You are talking about the 1952 counts.

MR. DIPIERO: Yes. Those are where individuals have traveled from out of state into West Virginia. Those are referred to in the third count, the sixth count, seventh count, eighth count, ninth count, tenth count, eleventh count, and twelfth count.

First, that each defendant at or about the time charged in the indictment traveled in interstate commerce.

(88) Second, that the travel was done with the specific intent to further the unlawful activity involving marihuana and the conspiracy to bring marihunana into West Virginia and the conspiracy to possess it with intent to distribute it.

Third, that the defendant, following such travel in interstate commerce, performed, or attempted to carry out, this particular business enterprise, or this particular conspiracy, as we have charged.

Those are the essential elements. Again, you heard that on a prior occasion.

With respect to 843(b) of Title 21, and that is important with respect to the different counts against Mr. James Chadwick, let me read the statute.

"It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter, or subchapter two of this chapter.

"Each separate use of a communication facility shall be a separate offense under this subsection."

It goes on to say that a communication facility includes a telephone. It would have to be a knowing and
(89) intentional use of the telephone or communication facility and that use was for committing or in causing or in facilitating the commission of any act or acts constituting a felony.

And we have listed here three separate sections, commission of certain acts — those would be possession with intent to distribute, conspiracy, conspiring to possess with intent to distribute under Section 846, and it also says importation into the customs territory of the United States of a controlled substance.

With respect to the fourth count, the essential elements, again, you hve heard this before, this regards possession with intent to distribute, Title 21, Section 841(a)(1) makes it unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance.

Three essential elements: One, that these defendants, Mr. Anderson, Seesing, and Lill, possessed marihuana, which is a controlled substance.

Second, that they did so possess with a specific intent to distribute the marihuana.

And, third, that each of these defendants did so
(90) knowingly and intentionally.

Finally, with respect to — I believe it is the second count — yes — which is the importation of the marihuana into the United States, the essential elements of smuggling marihuana into the United States are knowing importation of marihuana into the United States, intent to defraud, and knowledge that the importation is contrary to the statutes and regulations requiring that all merchandise imported into the United States from another country be declared or presented for inspection at the port of entry.

I think these elements and these statutes were more fully set out the last time we presented the previous indictment that was returned. And this is kind of a refresher course with respect to these various elements in these counts.

Again, the only additional one was the fifth count relating to the phone call to Mr. James Chadwick.

Are there any questions relative to the law or the essential elements which we would be required to prove at trial beyond a resonable doubt?

MR. HOFFMAN: All you must find is that under the law there is probable cause, probable cause that there has been a violation of the law, and that each of the defendants charged has violated the law.

JUROR: What was the basis that the government found to make marihuana illegal?

MR. HOFFMAN: Is this important in your consideration of this case, whether or not there are violations of the law here?

JUROR: No.

MR. HOFFMAN: If it is, we can go into it here, but I am sure that both these guys will be happy to talk with you about it off the record.

If it is important in your consideration of whether or not there has been a violation of the laws of the United States, or there is probable cause to believe that there has been a violation of the laws of the United States, we will be happy to go into it now if you want to.

MR. KING: Controlled drugs are classified in five different schedules. Schedule I is the one that has no known medical value. And the experts with respect to drugs place on Schedule I those drugs that have no known medical value.

(92) Marihuana has been determined pursuant to the law to be in that category and has been placed in Schedule I. So it is a Schedule I controlled substance under the law.

Is that correct, Mr. Rinehart and Mr. James?

MR. RINEHART: That's correct. And also due to the fact that it has a high potential for abuse.

MR. HOFFMAN: We will leave you to your deliberations

(Whereupon, the Grand Jury deliberated and was adjourned)

* * * * *

(93) CERTIFICATE OF COURT REPORTER

I, Rebecca J. Knott, RPR, do hereby certify that this is a true and correct transcript, to the best of my knowledge and belief, as reported by me in Stenotype.

Given under my hand this 3rd day of September, 1979.

REBECCA J. KNOTT, RPR

8 Corrected Original — March 14, 1980

States and their agents and the Grand Jury's use at a later time, if necessary. Thank you.

(Trooper Starcher left room)

Whereupon,

JERRY RINEHART and RANDLOPH JAMES were called as witnesses and, after being first duly sworn, were examined and testified as follows:

MR. HOFFMAN: Ladies and gentlemen, the proposed indictment that we have before you today to consider is one that includes several of the defendants in the previous case that you considered involving the crash of a DC-6 cargo plane at Kanawha County Airport on June 6, 1979.

I'd like to go over the indictment for you. It does charge some additional defendants and involves some additional or varied charges with some of the already indicted defendants.

The proposed indictment charges that:

"1. That for an unknown period of time up to and including the 6th day of June, 1979, at Charleston,

Kanawha County, West Virginia, and within the Southern District of West Virginia, and elsewhere, Breck Dana Anderson, David Thomas Seesing, Jerome Otto Lill, Mark Douglas Chadwick, James F. Chadwick, Craig Bruce McGilvray, Russell

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the evidence is in a minute from these agents.

Yes, he was the one that received the telephone call down here at the jail right after the crash.

I wonder, Agent James and Agent Rinehart, if you'll both state your full names for the record, please.

MR. RINEHART: Jerry Allen Rinehart.

MR. JAMES: Randolph D. James.

MR. HOFFMAN: I believe you both have been sworn before commencing this questioning, have you not?

MR. RINEHART: Yes, sir.

MR. JAMES: Yes.

MR. HOFFMAN: And you have both been present during my recitation of the charges

93 RECERTIFICATION OF COURT REPORTS

I, Rebecca J. Knott, RPR, do hereby certify that this transcript, as amended and corrected on pages 8 and 31 herein, is a true and correct transcript, to the best of my knowledge and belief, as reported by me in Stenotype.

Given under my hand this 14th day of March, 1980.

Rebecca J. Knott /sig/

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
AUG 1 1985
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CLERK

No. 84-1704, No. 84-1700, and No. 84-1640

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARSHALL MECHANIK, Petitioner
v
UNITED STATES OF AMERICA, Respondent

JEROME OTTO LILL, Petitioner
v
UNITED STATES OF AMERICA, Respondent

UNITED STATES OF AMERICA, Petitioner
v
MARSHALL MECHANIK, ET AL, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the joint testimony of two drug enforcement agents before a grand jury, in flagrant violation of Rule 6(d) of the Federal Rules of Criminal Procedure, requires that the entirety of a superseding indictment returned by that grand jury after such joint testimony be dismissed; or,

2. Whether the Court of Appeals erred in dismissing only one count of a multi-count indictment when the court of appeals held that the tandem presentation of the testimony of two material witnesses before the grand jury violated Federal Rule of Criminal Procedure 6(d), and that violations of Rule 6(d) require the dismissal of an indictment.

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A. *THE STRICT ENFORCEMENT OF FEDERAL RULE OF CRIMINAL PROCEDURE 6 IS NECESSARY TO PROTECT THE INTEGRITY OF THE GRAND JURY AS AN INDEPENDENT INVESTIGATORY BODY.*

B. *PER SE DISMISSAL OF THE ENTIRE INDICTMENT PROVIDES THE MOST EFFECTIVE MECHANISM FOR ENFORCEMENT OF THE PROCEDURAL RULE WITHOUT A REQUIREMENT THAT THE*

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IN THE SUPREME COURT OF THE UNITED STATES
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UNITED STATES OF AMERICA, Petitioner
v
MARSHALL MECHANIK, ET AL, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

This consolidated Brief on the Merits is filed on behalf of Marshall Mechanik and Jerome Otto Lill.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals on rehearing en banc is reported at 756 F.2d 994. The panel opinion is reported at 73[illegible] F.2d 136. The opinion of the district court is reported at 511 F. Supp. 50. Each parties' Petition for Writ of Certiorari included an appendix reprinting the opinions below.

JURISDICTIONAL STATEMENT

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Marshall Mechanik's Petition for Writ of Certiorari was mailed to the Court on April 29, 1985 within sixty days of the March 1, 1985, Opinion and Judgment of the Court of Appeals for the Fourth Circuit. Jerome Otto Lill's Petition for Writ of Certiorari was filed on April 30, 1985, within sixty days of the March 1, 1985, Opinion and Judgment of the Court of Appeals for the Fourth Circuit. Certiorari was granted on both Petitions on June 17, 1985.

RULES INVOLVED

Rule 6(d) of the Federal Rules of Criminal Procedure provides:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

STATEMENT OF THE CASE

On June 6, 1979, a DC-6 aircraft containing marijuana crash landed at Kanawha County airport, outside Charleston, West Virginia. The investigation resulting

from this event originally ended on June 14, 1979, in a twelve-count, nine-defendant indictment. (J.A. pages 9-18).

On August 10, 1979, after four days additional testimony, the grand jury returned a superseding twelve-count, twelve defendant indictment. (J.A. pages 19-33). On that day, and prior to issuance of the superseding indictment, two Drug Enforcement Administration (DEA) agents, Jerry Rinehart and Randolph James, were sworn in simultaneously by the prosecuting attorney and testified together before the grand jury for one hour. Their testimony intertwined, with one witness supplementing the other, and each making references to what "we" did, knew or observed. In addition, the prosecutor assisting the grand jury substantively elaborated on the testimony of the agents, using the collective "we". (J.A. pages 110-150).

Prior to trial, an omnibus motion was filed on behalf of the petitioners, requesting that the Government provide a list of all persons who appeared before the grand jury, for the express purpose of determining whether any unauthorized persons had appeared before the grand jury in violation of Fed. R. Crim. P., Rule 6(d). (J.A. page 45). In response to this specific pre-trial request, the Government denied that any unauthorized person had appeared before the grand jury, (J.A. page 46), and denied that any impropriety had occurred.[1] The petitioners also moved to dismiss the indictment, alleging grand jury impropriety. The district court denied these pretrial motions, and the trial commenced.

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[1]The Goverment conceded during oral argument before the panel in the Fourth Circuit on February 9, 1984, that the prosecution had denied any irregularity in the grand jury proceeding.

During the second week of trial, defense counsel discovered, upon receipt of material provided pursuant to the Jenck's Act, 18 USC §3500, that Rinehart and James had appeared and testified simultaneously before the grand jury. Counsel immediately moved for dismissal of the indictment (J.A. pages 47, 48). This motion was denied, based on the trial court's determination that there was no violation of Rule 6(d). (J.A. pages 49-51). The petitioners sought, through interlocutory appeal, a review of this determination. On April 10, 1980, the petition for review was denied as premature. On May 22, after the trial had been transferred to a different judge,[2] the petitioners renewed their motion to dismiss the indictment due to the violation of Rule 6(d) (J.A. page 52). On August 15, 1980, after the jury verdict was entered,[3] the district court issued a lengthy opinion concluding that the joint appearance of two DEA witnesses before the grand jury was a clear violation of Rule 6(d). *United States v. Lill, et al.*, 511 F. Supp. 50 (S.D. W. Va., 1980). However, the district court denied the motion to dismiss the indictment.

Despite the conclusion that Rule 6(d) was clearly violated, and despite the recognition that "federal decisions which have addressed [the question of whether the presence of an unauthorized person before the grand jury is *per se* prejudicial] are, in the main, uniform in adhering to the *per se* rule,"[4] the district court determined not to follow this straight line of precedent. The district

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[2]The original trial judge suffered a heart attack during the proceedings. (J.A. pages)

[3]Petitioner Marshall Mechanik was convicted of conspiracy and of traveling interstate in furtherance of an unlawful business enterprise. Petitioner Jerome Otto Lill was convicted of conspiracy, of importing marijuana, and of possession with intent to distribute marijuana. (J.A. pages).

[4]*United States v. Lill*, et al., 51 F. Supp. at 58.

court did, however, recite the improprieties and probable results[5] of the Government's flagrant violation of rule 6(d); a violation which, the district court found, would have mandated dismissal at pre or early trial stages.[6] In other words, had the Government not failed to disclose what was asked of them or had the original trial judge ruled correctly when the issue was first presented, the indictment would have been dismissed.

A panel of the Court of Appeals reversed the petitioners' conspiracy convictions because of the Rule 6(d) violation. However, the panel affirmed the other convictions because the substantive counts in the superseding indictment were identical to substantive counts in the original indictment, and the district court had determined from a meticulous examination of the evidence presented, that the grand jury had a valid basis for the substantive charges indpendent of the unauthorized joint appearance of the DEA agents. *United States v. Mechanik, et al.*, 735 F.2d 136 (4th Cir. 1984).

The case was reheard en banc upon the Government's motion. The en banc court affirmed the panel's determinations and adopted the panel's reasoning. *United States v. Mechanik, et al.*, 756 F.2d 994 (4th Cir. 1985).

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[5]The district court rejected the Government's contention that, due to the complexity of the charges and evidence involved, the joint testimony of two DEA agents was required for an effective presentation of the case. *United States v. Lill*, 511 F. Supp. at 57. The district court found that the joint testimony tended to be detrimental to the jurors' ability to assess the credibility and personal knowledge of the two agents. *Id.*, at 56. And, the district court determined that an added persuasiveness resulted from the joint presentation of testimony, thus undermining one of the policy reasons underlying Rule 6(d). *Id.*, at 57.

[6]*United States v. Lill*, et al., 511 F. Supp. at 61.

SUMMARY OF ARGUMENT

The government violated Federal Rule of Criminal Procedure 6(d), by presenting the tandem testimony of two drug enforcement agents to the grand jury. It is necessary that the grand jury be allowed extraordinary investigative leeway in order to properly perform its dual function. The grand jury is dependent upon the prosecutor for assistance. Strict prosecutorial compliance with Rule 6 is necessary to insure that the broad investigatory powers allowed the grand jury are not abused by the executive branch.

Historically, when the prosecution has violated the rule in a manner that threatened the integrity of the grand jury, the federal courts have enforced Rule 6(d) by dismissing the entire indictment without requiring a showing of prejudice. The court of appeals in this case endorsed that rule as to one count but erred in failing to dismiss the entire indictment. The judicial inquiry conducted by the district court into the substance of the evidence presented to the grand jury to determine whether or not the grand jury had a probable cause basis to issue the second indictment was error. Even if such an analysis was not prohibited, but was required, the court of appeals erred because the testimony serving as the probable cause basis for the charges which were affirmed was the same tainted testimony that served as the probable cause basis for the charges dismissed because of the rule violation.

Accordingly, the entire indictment must be dismissed.

ARGUMENT

THE INDEPENDENCE AND INTEGRITY OF THE GRAND JURY MANDATES THE DISMISSAL OF THE ENTIRE INDICTMENT FOR THE GOVERNMENT'S EGREGIOUS VIOLATION OF THE ONLY RULE GOVERNING GRAND JURY PROCEDURE

It is undisputed that Rule 6(d) was violated in this case. The Petitioners here have contended it, and renewed this contention from its earliest discovery. The trial judge held there was a violation. *United States v. Lill*, 511 F.Supp. at 58. Indeed, even the Government has acknowledged the violation.[7]

The question before this Court, then, concerns the proper remedy to employ whan a calculated, substantive, and flagrant violation of Rule 6(d) occurs by the Government. It is clear from the history and language of Rule 6(d) that the only appropriate remedy for its violation is dismissal of the entirety of the indictment.

A. THE STRICT ENFORCEMENT OF FEDERAL RULE OF CRIMINAL PROCEDURE 6 IS NECESSARY TO PROTECT THE INTEGRITY OF THE GRAND JURY AS AN INDEPENDENT INVESTIGATORY BODY.

The history of the grand jury is rooted in the common and civil law, extending from Periclesean Athens through pre-Norman England to the Assize at Clarendon promulgated by Henry II in 1166. In its origin, the grand jury was a device which authorized the central government to investigate crimes; it benefited the government rather than the suspect. The grand jury became a mechanism for charging individuals with crimes, then, as the petit jury system developed, the grand jury evolved into a mechanism for protecting the individual from govern-

[7]See the Government's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, P. 9 (No. 84-1640)

ment abuse. As a right of individual liberty, the grand jury was first mentioned in America in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the Colony of New York. Included from the first in James Madison's introduced draft of the bill of Rights, the grand jury provision elicited no recorded debate and no opposition. It now resides in the Fifth Amendment to the Constitution of the United States.[8]

The grand jury occupies a high place as an instrument of justice unique to our criminal justice system. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959); *Costello v. United States*, 350 U.S. 359 (1956). In *Costello*, this Court eloquently described the grand jury:

> The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes .... Despite its broad power to institute criminal proceedings, the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring

[8]See generally, Morse, "A Survey of the Grand Jury System," 10 Ore. L. Rev. 101 (1931), Also, "The Grand Jury", Edwards, (1906).

> charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury as convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. [*Costello v. United States*,350 U.S. 359 (1956).]

As the body entrusted to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution by determining if there is probable cause to believe that a crime has been committed, the grand jury has always been extended extraordinary powers of investigation, generally unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. *United States v. Calandra*, 414 U.S. 338 (1974); *Blair v. United States*, 250 U.S. 273 (1919). The broad, virtually unrestrained grand jury powers are considered necessary to permit that body to carry out its dual function by allowing thorough and effective investigations. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Consistent with the paramount necessity for broad investigatory powers, only one procedural rule addresses grand jury practice, Federal Rule of Criminal Procedure 6. This rule of procedure, particularly subsection (d), enhances rather than limits the functioning of the grand jury by insuring secrecy and protecting the independence of the grand jury by protecting the grand jury from undue influence. *United States v. Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983).

The grand jury consists of ordinary citizens, generally with little knowledge of the intricacies or complexities of either substantive or procedural criminal law. Particularly in modern times, the grand jury requires the assistance of the prosecutor to properly perform its dual function. As recognized in *Sells Engineering*, the prosecutor assists in securing the evidence and witnesses required, and advises

the lay jury on the applicable law. The purpose of the grand jury, however, requires that it remain free to operate independently of the prosecuting attorney and the court. *Stirone v. United States*, 361 U.S. 212 (1960). Rule 6 recognizes these potentially inconsistent principles and protects against the potential for abuse of the grand jury's extraordinary investigative power by the rare representative of the executive branch who is unwilling to properly perform the prosecutorial functions. Not unduly burdensome so as to encumber either the prosecutor or the grand jury in their proper respective roles, compliance with Rule 6(d) insures the crucial balance necessary to allow the grand jury the investigative leeway to properly function in our criminal justice system with the assistance of the prosecutor. Indeed, as the grand jury is granted extraordinary powers of investigation, because of the difficulty and importance of the tasks, Rule 6 limits those powers as far as reasonably possible to assure the accomplishment of the tasks. *United States v. Sells Engineering, Inc.*, — U.S. —; 103 S. Ct. at 3143; No. 81-1032 (June 30, 1983).

The grand jury has a protected place in this country's hierarchy of constitutional values. However, to continue to fulfill its function of "protection of citizens against unfounded criminal prosecutions", *Branzburg v. Hayes*, 408 U.S. 665, 686-7 (1972), the integrity of the grand jury system must be maintained free from undue Government influence or usurpation. Congress and the courts have consistently defended the grand jury from unwarranted manipulation.

An unbroken series of cases extending through this countries' constitutional history reveals no case where a court has ever relaxed the stringent preservation of the secrecy and integrity of grand jury proceedings. The cases cited below all reflect the age-old policy that the presence of an unauthorized person in the grand jury room for any significant or deliberate duration of time or purpose mandates dismissal of the entire indictment.[9]

room for any significant or deliberate duration of time or purpose mandates dismissal of the entire indictment.[9]

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[9]*United States v. Edgerton*, 80 F. 374 (D. Mont. 1897) (expert witness remained after testifying and asked questions of another witness); *Latham v. United States*, 226 F.2d 420 (5th Cir. 1915) (unauthorized person was present to record testimony throughout grand jury proceedings); *United States v. Carper*, 116 F. Supp. 817 (D.D.C. 1953) (deputy marshalls present throughout testimony of prisoner witnesses); *United States v. Borys*, 169 F. Supp. 366 (D. Alaska 1959) (mother of witness present throughout daughter's testimony); *United States v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971) (FBI agent called upon by prosecutors to enter grand jury room to play a recording device during testimony of a witness); *United States v. Daneals*, 370 F. Supp. 1289 (W.D. N.Y. 1974) (unauthorized agency regional counsel appeared and advised grand jury); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977) (unauthorized person present throughout as observer and assistant prosecutor); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977) (unauthorized person was present throughout testimony of a witness and conducted part of questioning); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (government attorney who testified before a grand jury and then resumed prosecutorial role violated Rule 6(d); *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978) (attorney for antitrust division appeared before a grand jury and remained after testifying in violation of Rule 6(d); *United States v. Boyle*, 338 F. Supp. 1028 (D.D.C. 1972) (presence unauthorized person in grand jury room raises presumption of prejudice; however, court refused to dismiss indictment because defendant failed to set forth sufficient facts in support of claim); *United States v. Goldman*, 28 F. 2d 424 (D. Conn. 1928) (presence of a special assistant acting as stenographer was unauthorized); *United States v. Philadelphia RRwy Co.*, 221 F. 683 (E.D. Pa. 1915) (presence of attorneys who were stenographers before grand jury constituted unauthorized personnel); *United States v. Rubin*, 218 F. 245 (D. conn. 1914) (presence of unofficial stenographer taking shorthand before grand jury was unauthorized); *United States v. Heinz*, 177 F. 770 (S.D.N.Y. 1910) (expert accountant in grand jury room to assist in the handling of technical questions with accountant witness was unauthorized — prejudice is presumed in law); *United States v. Newman*, 534 F. Supp. 1113 (S.D.N.Y. 1982) (Government sought to have indictment dismissed without prejudice because unauthorized special assistant in grand jury room); *United States v. Pignatiello*, 582 F. Supp. 251 (D. Colo. 1984) (presence of unsworn SEC attorney required per se dismissal); see also *State v. Frazier*, 252 S.E. 2d 39 W.Va. 1979).

This case authority only serves to reaffirm Congress' clear intent that Rule 6(d) be stringently enforced. The Federal Rules of Criminal Procedure have the force and effect of statutory law, and are binding on the federal courts. *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870 (4th Cir. 1964). Rule 6(d), which is unambiguous, provides that *only* certain enumerated persons are authorized to be present while the grand jury is in session. Had Congress intended to make the invocation of this rule discretionary, it would have written 6(d) to reflect that intent by broadening its scope with general language. Or, Congress would have indicated that a breach of the rule would not be deemed to "affect the substantial rights" of defendants or that "the court for good cause shown" may excuse a breach. *Cf.* Fed. R. Crim. P. 12(f). However, Rule 6(d) was crafted without any such safety valves. Rather, Congress took great pains in Rule 6(d) to carefully describe those persons authorized to be present in the grand jury room. Thus, Congress' intent was clearly manifested in the plain wording of the Rule.

It is clear that where any substantive violation of Rule 6(d) occurs, dismissal of the indictment is required.

(Footnote continued)
Coblentz v. State, 164 Md. 558, 166 A. 45, 48-49 (1933); *Corbin v. Boardman*, 6 Ariz. App. 426, 433 P.2d 289, 294-296 (1967) (apparent per se rule); *State v. Revere*, 232 La. 184, 94 So. 2d 25, 33-34 (1957); *Commonwealth v. Harris*, 231 Mass. 584, 121 NE 409 (1919); *State v. District Court of First Judicial District*, 220 P.2d 1035, 1051 (Mont. 1950); *State v. Hill*, 88 N.M. 217, 539 P.2d 236, 239-40 (1975); *People v. Minet*, 296 N.Y. 315 (1947); *State v. Johnson*, 214 NW 39, 41 (N. Dak. 1927) (apparent per se rule); *Hammers v. State*, 337 P.2d 1097, 1109-1110- (Okla. Cr. 1959); *Meyer v. Second Judicial District Court* in and for Weber County, 156 P.2d 711, 714 (Utah 1945).

Courts have recognized however, that brief intrusions during which the grand jury proceedings were halted do not require dismissal; See, e.g. *United States v. Condo*, 741 F.2d 238 (9th Cir. 1984), *cert den.* No. 84-5793, Jan. 14, 1985; *United States v. Kaham & Lessin Co.*, 695 F.2d 1122 (9th Cir. 1982); *United States v. Rath*, 406 F.2d 757 (6th Cir. 1969), *cert. den.* 394 U.S. 920 (1969); and *United States v. Computer Sciences Corp.* 684 F.2d 1181, *cert. den.* 459 U.S. 1105 (1982).

Ironically, the Government in its Petition agreed that, if dismissal of the indictment is required by violation of Rule 6(d), as the Court of Appeals purported to hold, the indictment in its entirety must be rendered void.[10]

B. PER SE DISMISSAL OF THE ENTIRE INDICTMENT PROVIDES THE MOST EFFECTIVE MECHANISM FOR ENFORCEMENT OF THE PROCEDURAL RULE WITHOUT A REQUIREMENT THAT THE COURT INQUIRE INTO THE EVIDENCE PRESENTED TO THE GRAND JURY FOR DETERMINING WHETHER OR NOT THE RULE VIOLATION TAINTED THE PROBABLE CAUSE FINDING.

The analysis conducted by the trial court and adopted by the court of appeals in declining to apply the per se rule of dismissal to the substantive counts (two, four and ten) of the superseding indictment required a meticulous comparison of the indictments and an actual in depth judicial inquiry into the substantive testimony presented to both grand juries for a determination that there was a probable cause basis for the substantive counts, independent of the tainted testimony, by virtue of their inclusion in the original indictment. The lower court erred in endeavoring to analyze the sufficiency of the evidence presented to the grand jury to determine whether or not the grand jury's probable cause determination was

[10]Government's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, P. 14, N. 9 (No. 84-1640). See also, *United States v. Fulmer*, 722 F. 2d 1192, 1195 (5th Cir. 1983), where the government conceded that dismissal of a superseding indictment was the proper remedy for a substantive violation of Rule 6(d).

founded on sufficient proof. *Beavers v. Henkel*, 194 U.S. 73 (1904); *Costello v. United States*, 350 U.S. 359 (1956). Such an inquiry frustrates the orderly administration of justice and threatens the independence of the grand jury. The judicial inquiry into the sufficiency of the evidence supporting the grand jury's probable cause finding in this case should not be endorsed by this Court merely because it is the Government, rather than the defendant, who reaps the benefit of such a time consuming exercise in judicial second guessing. Per se dismissal for the egregious rule violation is appropriate because any judicial determination regarding the existence of prejudice requires forbidden inquiry by the court into the historical province of the grand jury.

The above-substantive objection notwithstanding, the procedural impediments to only enforcing Rule 6(d) when a violation results in demonstrable prejudice militate against the adoption of such a rule. Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure*, at 914 (4th Ed. 1974); *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978). Which party has the burden of proof? Despite overriding considerations of grand jury secrecy, is the defendant entitled to examine all of the substantive evidence presented to the grand jury to demonstrate prejudice? What is the effect of the Government's pretrial denial of the existence of the rule violation, which, as in this case proves to be false?

On the other hand, the ease of administration of per se dismissal gives the rule meaning without creating an unworkable and burdensome standard.

The long line of precedent applying the pre se rule of dismissal for 6(d) violations recognized and adopted the above considerations, and endorsed the per se rule of dismissal in order to protect against potential prejudice to the grand jury system, rather than focusing on the immeasurable effect of the rule violation on the actual

defendant. *United States v. Carper*, 116 F. Supp. 817 (D.D.C. 1953); *United States v. Fulmer*, 722 F.2d 1198 Cir. 1983); *Latham v. United States*, 226 F. 420 (5th Cir. 1915); *United States v. Echols*, 542 F.2d 948 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okl. 1977); *United States v. Borys*, 169 F. Supp. 366 (D. Alaska 1959); *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978); *United States v. Branniff Airways, Inc.*, 428 F. Fupp. 578 (W.D. Tex. 1977); *United States v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971); *United States v. Gold*, 470 F. Supp. 1336 (N.D. I11. 1979); *United States v. Edgerton*, 80 F. 374 (D. Mont. 1877).

Even if the lower court analysis of the evidence considered by the grand jury was proper, or required, in the instance of a 6(d) violation, it was factually erroneous.

The petitioners Lill and Mechanik were brought to trial on the tainted superseding indictment, and the taint as to all counts is easily demonstrated by reference to the joint testimony. During the tandem testimony of Rinehart and James, the grand jurors were specifically instructed by the prosecutor that the factual basis for overt act (hh) of the conspiracy count also provided the probable cause basis for the charges against Lill in the proposed Counts Two and Four of the superseding indictment. (J.A. pages 132-133). Similarly, the prosecutor instructed the grand jury that the factual basis for overt act (dd) of the conspiracy count also provided the probable cause basis for Count Ten against Mechanik. (J.A. page 129) Additionally, the charging language of the overt acts (dd) and (hh) of the dismissed conspiracy Count One was virtually identical to the changing language of substantive Counts Ten, Two and Four respectively.

Following dismissal, the government may be free to properly present the case to a grand jury, reindict, and retry the petitioners. The probable short-lived "windfall" to the petitioners realized by the application of per se

dismissal is far outweighed by the societal benefits derived from the historically uniform application of a Federal Rule which preserves the integrity of the grand jury and benefits the entire criminal justice system.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it fails to overturn the petitioners' convictions on the substantive counts of the indictment.

RESPECTFULLY SUBMITTED

PETITIONER'S

BRIEF

(8) (5) (5)

Nos. 84-1640, 84-1700, and 84-1704

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHALL MECHANIK AND JEROME OTTO LILL

JEROME OTTO LILL, PETITIONER

v.

UNITED STATES OF AMERICA

MARSHALL MECHANIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a facially valid indictment returned by a legally constituted and unbiased grand jury may be dismissed on the basis of a procedural irregularity in the grand jury proceeding.

2. If so, whether the indictment may be dismissed and a conviction reversed on the basis of such irregularity after an otherwise valid conviction has been entered by a petit jury.

3. Whether it is an appropriate remedy to reverse the conviction and dismiss the indictment in the absence of prejudice to the defendant resulting from the procedural irregularity in the grand jury proceeding.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, Shahbaz Shane Zarintash and Steven Henry Riddle were appellants below; as described in our reply brief at the petition stage in No. 84-1640, they have now pleaded guilty to charges that moot the instant case as to them, and therefore they are no longer respondents herein. Mark Douglas Chadwick was also an appellant below, but his appeal was dismissed and he is accordingly not a respondent in this proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1640

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHALL MECHANIK AND JEROME OTTO LILL

No. 84-1700

JEROME OTTO LILL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1704

MARSHALL MECHANIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The per curiam opinion of the court of appeals on rehearing en banc (Pet. App. 1a-13a)[1] is reported at 756 F.2d 994. The opinion of the panel of the court of appeals (Pet. App. 14a-25a) is reported at 735 F.2d 136. The opinion of the district court (Pet. App. 26a-53a) is reported at 511 F. Supp. 50.

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[1] "Pet. App." refers to the appendix to the government's petition, No. 84-1640.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 1, 1985. The government's petition for a writ of certiorari (No. 84-1640) was filed on April 17, 1985. The defendants' petitions (Nos. 84-1700 and 84-1704) were filed on April 29, 1985. The petitions were granted and the cases consolidated on June 17, 1985.[2] The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

Rule 6(d) of the Federal Rules of Criminal Procedure provides:

> **Who May Be Present.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

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[2] The petition in No. 84-1704 was granted limited to Question 1.

STATEMENT

Following a three-month jury trial in the United States District Court for the Southern District of West Virginia, defendants Mechanik and Lill were convicted of conspiracy, in violation of 18 U.S.C. 371 (Count One). In addition, Mechanik was convicted of traveling in interstate commerce to carry on an illegal business enterprise, in violation of 18 U.S.C. 1952 (Count Ten), and Lill was convicted of importing marijuana and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 952 and 841, 18 U.S.C. 2 (Counts Two and Four). Mechanik and Lill were each sentenced to five years' imprisonment and fined $10,000.[3] The court of appeals affirmed their convictions on the substantive counts and reversed their convictions on the conspiracy count (Pet. App. 4a).

1. On June 6, 1979, shortly before 1:00 a.m., a DC-6 aircraft carrying approximately ten tons of marijuana crash-landed at an airport near Charleston, West Virginia. Defendant Lill was among those on board the plane. Defendant Mechanik and others were waiting on the ground for the plane. Pet. App. 28a.

On June 12, 1979, a federal grand jury was convened to investigate the marijuana operation. On June 14, 1979, after hearing some 30 witnesses, it returned an indictment containing one conspiracy count and seven substantive counts. The indictment named nine defendants, including Mechanik and Lill. Pet. App. 28a.[4]

Thereafter, the investigation continued and further evidence was obtained (Pet. App. 16a). Accordingly, on July 31 and August 2, 9, and 10, 1979, the same grand jury, consist-

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[3] Two co-defendants, Shahbaz Shane Zarintash and Steven Henry Riddle, were also convicted on the conspiracy count; Zarintash was sentenced to five years' imprisonment and fined $10,000, and Riddle was sentenced to five years' imprisonment and fined $5,000. Two other defendants, James F. Chadwick and Russell Kook, were acquitted. The jury was unable to reach a verdict as to Mark Douglas Chadwick, and a mistrial was declared. Four of the original 12 defendants pleaded guilty to the conspiracy count prior to trial. One defendant is a fugitive.

[4] The original indictment is reprinted at J.A. 9-18.

ing of a nucleus of 17 of the same individual grand jurors,[5] met again to consider the additional evidence. The grand jury then unanimously returned a superseding indictment on August 10, 1979. The superseding indictment was similar in many respects to the first, but it named three new defendants, included two additional substantive counts, and amended and expanded the conspiracy count. Pet. App. 29a, 45a.[6] The substantive counts under which Mechanik and Lill were convicted were identical in both indictments in all respects material to them.[7]

The principal differences between the original and the superseding indictments were in the conspiracy count (Count One), on which Mechanik's and Lill's convictions were reversed by the court of appeals. Each of the alterations in the conspiracy count, other than those deleted by the district court at trial or mooted by the acquittal of other defendants,[8] was supported by evidence from at least two independent sources (Pet. App. 47a). One of those sources was the testimony of Drug Enforcement Administration (DEA) Agents Jerry Rinehart and Randolph James. On August 10, 1979, these agents were placed under oath and testified together before the grand jury. See *id.* at 29a-32a; J.A. 110-148. Agent James testified principally concerning the suspects'

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[5] One of the grand jurors who participated in the original indictment did not participate in the superseding indictment, and two individuals participated in the superseding indictment who had not participated in the original indictment (Pet. App. 46a).

[6] The superseding indictment is reprinted at J.A. 19-33.

[7] Defendant Gregory Louis McCafferty was charged in Counts Two and Four of the original indictment, but not in the corresponding counts of the superseding indictment (Pet. App. 46a & n.10).

[8] At the conclusion of the government's case in chief, the district court redacted the superseding indictment to conform to its rulings on the government's motion to dismiss a portion of the indictment and the defendants' motions to strike and for judgment of acquittal. The redacted superseding indictment is reprinted at J.A. 34-44. In addition, parts of the redacted indictment were stricken by the district court at the close of the evidence (Pet. App. 50a-51a & n.15). Portions of the superseding indictment that had been changed from the original indictment also pertained to defendants Russell Kook and James Chadwick, who were acquitted by the jury.

travel, the rental of Ryder trucks for unloading and transporting the marijuana, and James Chadwick's alleged involvement in the conspiracy; Agent Rinehart testified principally about telephone calls involving the suspects (Pet. App. 32a). The agents generally alternated their testimony, occasionally supplementing each other's answers. Because Rinehart and James handled different aspects of the investigation, this format enabled them to present the evidence in chronological order and to interrelate the various activities of the suspects that were occurring at the same time.

2. Prior to trial, the defendants filed an omnibus motion seeking, inter alia, a list of all people who had appeared before the grand jury. They alleged in general terms that this discovery was essential in order to determine whether any unauthorized person might have been present during the grand jury proceeding. J.A. 45. The government responded that there were no unauthorized persons appearing before the grand jury (J.A. 46). The district court denied the defendants' motion (Pet. App. 26a-27a).

The trial began on February 19, 1980, and concluded on July 3, 1980. During the second week of trial, on February 28, 1980, Agent Rinehart testified as a government witness. At that time, the government furnished the defendants with a portion of the transcript of his grand jury testimony pursuant to the Jencks Act, 18 U.S.C. 3500. The transcript disclosed that on August 10, 1979, Agent Rinehart and Agent James had testified simultaneously before the grand jury. The defendants thereupon moved for dismissal of the indictment on the ground that Fed. R. Crim. P. 6(d) had been violated by the presence of two witnesses before the grand jury at the same time. Pet. App. 27a. On March 14, 1980, the district court denied this motion (J.A. 49-51). Chief Judge Knapp, who was then presiding over the trial, concluded (J.A. 50) that "neither Agent James nor Agent Rinehart, as sworn joint witnesses under examination, was an unauthorized person before the grand jury" and that "[p]resenting the testimony of Agents James and Rinehart as a joint witness was proper under the provisions of Rule 6(d) * * * and was a

reasonable and permissible manner in which to conduct the grand jury proceedings on that occasion."[9]

On May 22, 1980, following the mid-trial reassignment of the case to Judge Copenhaver,[10] the defendants moved for rehearing of the denial of their motion to dismiss the indictment under Fed. R. Crim. P. 6(d) (J.A. 52-54). The district court took the motion under advisement until the conclusion of the trial (Pet. App. 27a-28a).

The jury returned its verdicts on July 3, 1980 (Pet. App. 28a). On August 15, 1980, the district court denied the defendants' motion for dismissal pursuant to Rule 6(d) (Pet. App. 26a-53a).[11] Judge Copenhaver first concluded, contrary to Chief Judge Knapp's earlier ruling, that the joint testimony of Agents Rinehart and James did constitute a violation of the Rule (*id.* at 33a-43a). He noted (*id.* at 38a, 40a) that Rule 6(d) serves to protect the secrecy of grand jury proceedings and to guard against undue influence upon grand jury witnesses or the grand jurors. Although finding that "[r]ealistically * * * the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case" (Pet. App. 40a), the court believed that "the joint witness approach tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of Agents Rinehart and James and to contrast and compare the substantive evidence elicited through their testimony" (*id.* at 41a).

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[9] While the trial continued, the defendants filed a notice of appeal from the district court's denial of their motion to dismiss and sought a stay pending appeal. The stay was denied. On April 10, 1980, the court of appeals denied their petition for a writ of mandamus and for a writ of prohibition. See Pet. App. 27a.

[10] Chief Judge Knapp had been unexpectedly hospitalized during the trial (Pet. App. 27a-28a).

[11] On August 1, 1980, the district court, while reserving decision on the Rule 6(d) issue, had denied the defendants' motion to dismiss the indictment on grounds of government misconduct (C.A. App. A1700-A1723). Insofar as relevant here, the court determined that "the grand jury proceedings subsequent to June 14, 1979 [the date of the original indictment], were reasonably related to the grand jury's continuing investigation of other potential defendants" (*id.* at A1702) and that there was "no intention by the government to confuse or misinform the grand jury through the use of the joint testimony, nor evidence of bad faith" (*id.* at A1705). See also Pet. App. 12a.

Although it concluded that Rule 6(d) had been violated, the district court declined to set aside the defendants' indictment and convictions (Pet. App. 43a-53a). The court assumed that if this issue were being resolved "prior to trial, dismissal might well be decreed as the proper and prudent course" (*id.* at 51a).[12] However, noting that the Rule "does not prescribe the sanction to be imposed for its violation" (*id.* at 52a), the court declined to order dismissal in this case. Based on a meticulous examination of the original and superseding indictments returned by the grand jury and the evidence on which the indictments rested, the court found that the Rule 6(d) violation had not prejudiced the defendants. First, with respect to the substantive counts in the superseding indictment, "there was neither prejudice nor potential for prejudice" because those charges were unchanged from the valid initial indictment in any way material to the convicted defendants (*id.* at 46a). Second, with respect to the conspiracy count, the grand jury "had before it ample independent evidence [apart from the joint testimony] to support a probable cause finding of the charges" (*id.* at 51a). Accordingly, the court concluded that "the grand jury would * * * undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately" (*ibid.*). For this reason, prejudice to the defendants was possible only "in the sense that all things are possible[.] * * * [T]he existence of actual prejudice as to the conspiracy count is so utterly remote and the absence of actual prejudice as to the * * * substantive counts is so plain that a mere possibility of prejudice can appropriately be disregarded" (*ibid.*).

In light of these determinations, the district court explained that post-trial dismissal of the indictment would "confer[] a windfall benefit on [the] defendants who stand convicted after a three-month trial conducted at enormous ex-

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[12] The court explained that "[p]retrial dismissal would serve the salutary disciplinary function of underscoring the care which the prosecutor must observe in meeting the requirements of Rule 6(d)" (Pet. App. 51a).

pense to the United States and the defendants" (Pet. App. 51a). Rather than imposing such a drastic and unwarranted remedy, the court undertook to ensure compliance with the one-witness rule in the future by directing the government "henceforth * * * routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled" (Pet. App. 52a). The court observed (*id.* at 52a-53a) that it would be able "to monitor the accuracy of the reporting process" by virtue of disclosures pursuant to the Jencks Act, 18 U.S.C. 3500, and "the increasing frequency with which the court is called upon to review grand jury material for various *in camera* purposes."

3. a. A divided panel of the court of appeals reversed the conspiracy convictions (Pet. App. 14a-22a). After concluding that the joint testimony was a violation of Rule 6(d), the court "reject[ed] the argument that defendants must show that a rule 6(d) violation prejudiced them before an indictment may be dismissed" (Pet. App. 18a-19a; see also *id.* at 20a). It reasoned that Rule 6(d) is "plain and unequivocal in limiting who may appear before a grand jury" and that a requirement that the defendant show prejudice "would impose a difficult burden that could undermine the protection that the rule provides" (Pet. App. 19a). As a basis for distinguishing its decision in *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983), in which the court seemingly rejected the application of a per se rule to violations of Rule 6(d), the court of appeals concluded that the agents' joint testimony here "could have" bolstered each agent's credibility and "could have" influenced the grand jurors' decision to return the superseding indictment (Pet. App. 20a).[13]

At the same time, the court of appeals affirmed the convictions of Mechanik and Lill on the substantive counts of the indictment. Because these three substantive counts in the superseding indictment were identical to counts returned in the untainted original indictment by the same grand jury, the court found "a valid basis for the charges they set forth that

[13] We note that the grand jury proceedings in this case antedated the court of appeals' decision in *Computer Sciences*.

was independent of the unauthorized joint appearance of the agents" (Pet. App. 21a). In this circumstance, "invocation of a per se rule of invalidity is inappropriate" (*ibid.*).

Judge Hall dissented from the reversal of the conspiracy convictions (Pet. App. 23a-25a). Noting that "even on appeal [the defendants] have been unable to advance any basis for a claim of prejudice" (*id.* at 24a), Judge Hall relied on the "carefully reasoned opinion" (*id.* at 23a) and "detailed analysis" (*id.* at 24a) of the district court to conclude that the Rule 6(d) violation had not resulted in any prejudice. Moreover, he found the majority's decision "particularly undesirable here, where the part of the superseding indictment found to be bad closely tracked the charging portion of the original indictment and in no way surprised or prejudiced the defendants" (*id.* at 25a). Finally, the dissent observed (*ibid.*) that the majority had established a "*per se* rule" of dismissal that was inconsistent with the analysis in *Computer Sciences*.

b. The full court ordered rehearing en banc (Pet. App. 54a-55a). On rehearing, by a vote of seven to five, the court reversed the conspiracy convictions for the reasons stated in the panel opinion (*id.* at 2a). In addition, by a vote of ten to two, the court affirmed the substantive convictions of Mechanik and Lill for the reasons stated by the panel (*ibid.*).

Judge Wilkinson, joined by Judges Russell, Hall, Chapman, and Sneeden, dissented from the en banc judgment "insofar as it invokes 'a per se rule of invalidity' to reverse the convictions and dismiss the conspiracy count in the superseding indictment" (Pet. App. 5a). The dissent concluded that such a per se standard was not required by Rule 6(d) and was inconsistent with the harmless-error standard in Fed. R. Crim. P. 52(a) and 28 U.S.C. 2111 (Pet. App. 7a-8a). Moreover, the dissent found it "inexplicable" that Rule 6(d) should give rise to a remedial standard of per se dismissal that "the Supreme Court has refused to accord non-prejudicial departures from most constitutional norms" (Pet. App. 9a). In this case, a "comparison of testimony and the history of this particular grand jury fully support the determination [by the district court] that the defendants suffered no prejudice through the joint appearance of the agents" (*id.* at 13a) and "that the

government conduct revealed no evidence of bad faith and no intent to confuse or mislead the grand jury" (*id.* at 12a). Accordingly, the dissent stated that the relevant "factors were properly weighed" by the district court and that "the relief [it] granted * * * was appropriate to the situation" (*id.* at 13a). In contrast, the majority's holding of per se dismissal meant that

> [w]ithout cause or compensation, the public will now pay the price, and convicted criminal defendants will now reap the windfall benefit, of a prosecutorial mistake. This result is not right in a system of criminal justice which has become enormously complex and in which even seasoned judges and attorneys are not immune from error.

Id. at 5a.

Judges Widener and Phillips dissented from the affirmance of the convictions of Mechanik and Lill on the substantive counts (Pet. App. 2a). In their view, "these counts of the indictment [should be dismissed] for the same reasons that [the conspiracy count] is dismissed" (*ibid.*).

SUMMARY OF ARGUMENT

I

It is a well-settled principle of federal criminal procedure that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (footnote omitted). In this case, it is undisputed that the grand jury that indicted the defendants was legally constituted and unbiased, and neither its authority nor its impartiality was impaired by the joint testimony of the DEA agents. Accordingly, under *Costello*, this violation of Rule 6(d) provides no basis for dismissal of the indictment.

The *Costello* rule recognizes that the grand jury is designed to serve only a limited function in the criminal justice system. In contrast to the petit jury, the grand jury neither adjudicates the issue of guilt or innocence nor is bound by the various procedural and evidentiary protections afforded a criminal defendant at trial. Rather, it is a nonadversarial and unstructured proceeding to determine whether, under a standard of probable cause, there is a sufficient basis to call for a trial before a petit jury. Thus, the grand jury is merely a preliminary step in the overall process and constitutes a "rough" screen to eliminate at the outset those accusations that are not supported by probable cause.

In view of the narrow role played by the grand jury, facially valid indictments should not be open to pretrial challenge and dismissal on grounds of procedural irregularity. A contrary rule encourages defendants routinely to contest the propriety and adequacy of the grand jury proceeding, especially in cases involving lengthy or complex investigations. Litigation over such claims—the vast majority of which, experience indicates, are likely to be unfounded—would both delay the trial on the merits and impose substantial demands on finite judicial and prosecutorial resources. In addition, a procedural irregularity generally would not undermine the existence of probable cause, and requiring the government to re-present its case to a second grand jury—merely in order to obtain a procedurally proper indictment—pointlessly imposes significant costs on the prosecutor, the victims of crime and other witnesses, and the citizens empaneled on grand juries.

Nor can these burdens on the criminal justice system be justified in terms of minimizing to any appreciable extent the danger that defendants will be forced to trial on unwarranted allegations. It does not denigrate the importance of the screening function of the grand jury to recognize that the occurrence of a procedural error is unlikely to mean that the defendant was indicted without probable cause or to suggest that he would not simply be reindicted by a new grand jury. And even if pretrial dismissal might on occasion marginally further the grand jury's proper performance of its screening role, any benefit of this type would not be sufficient to offset the substantial systemic costs that would result from encouraging defendants to litigate challenges to the procedural regularity of the grand jury that indicted them.

Finally, the remedy of dismissal is not necessary in order to enforce grand jury procedural rules. Instead, alternative remedies are available—such as contempt, disciplinary sanctions, public reproach, or regular notification to the court that the rules have been observed—that, by focusing on the responsible prosecutor, both better serve to ensure future compliance and avoid the substantial costs that dismissal imposes on the criminal justice system. And while application of the *Costello* principle will substantially reduce the incentives to indicted defendants to discover and challenge grand jury irregularities, such procedural violations as may on occasion occur will be revealed to the courts in ways other than motions to dismiss, including the required disclosure of grand jury materials under the Jencks Act, 18 U.S.C. 3500.

II

Even if a procedural irregularity in the grand jury can be a basis for pretrial dismissal of the indictment, it cannot warrant reversal of a conviction once the defendant has been found guilty beyond a reasonable doubt by a petit jury at a fair trial. Such post-conviction relief would entail significant societal costs well beyond those that would result from a pretrial remedy. These include (1) the substantial burden on all concerned—the courts, the prosecutor, members of the public who are called to participate as jurors or witnesses, and, of special importance, the victims of crime—of repeating a fair and error-free trial on the issue of the defendant's guilt or innocence; (2) the practical reality, in view of the passage of time, that a retrial might not be possible at all or that the government might not be able to satisfy at the second trial the stringent standards necessary to secure a conviction, thus absolving a guilty defendant from any penalty for his crime; and (3) the attendant delay that frustrates the prompt administration of justice and impedes the objectives of deterrence and rehabilitation.

Even more importantly, a defendant convicted by a petit jury at trial no longer has any cognizable interest in litigating the question of the procedural regularity of the grand jury process. The petit jury's verdict of guilt beyond a reasonable

doubt necessarily establishes the existence of probable cause to prosecute, dispels any concern that the defendant was required to stand trial on an unfounded charge, and in effect conclusively renders any grand jury impropriety harmless error. The issue of probable cause is thus merged into the conviction, and the procedural validity of the grand jury's screening mechanism is of no continuing legal consequence. Accordingly, at least outside the unique context of racial discrimination in the selection of the grand jury (see *Rose* v. *Mitchell*, 443 U.S. 545 (1979)), a defect in the grand jury proceeding should not be a ground for post-trial reversal of an otherwise valid conviction determined by a petit jury.

III

Even if a procedural grand jury error provides a basis for relief in some circumstances, dismissal of an indictment or reversal of a conviction remains wholly inappropriate in the absence of some likelihood of prejudice to the defendant. Under the governing principle that judicial remedies should be tailored to correct the adverse effect of a violation on the defendant and not unnecessarily infringe on competing societal interests, dismissal or reversal would be unwarranted unless there has been demonstrable prejudice. Likewise, under Fed. R. Crim. P. 52(a) and 28 U.S.C. 2111, federal courts are required to disregard errors that are harmless and do not affect the defendant's substantial rights. In light of these standards, it is clear that the court of appeals' approach of per se reversal for a Rule 6(d) violation, without regard to whether the violation was likely to have impacted materially on the decision to indict, is fundamentally misconceived. In dealing with grand jury errors outside the Rule 6(d) area, the courts of appeals have held that the remedy of dismissal or reversal is unavailable absent prejudice; Rule 6(d) violations seem generally less likely than other errors to result in actual prejudice and therefore surely do not deserve the special status of per se reversal accorded by the court below.

Under the proper standard, it is manifest, as the district court found, that no prejudice occurred. The joint testimony of the DEA agents in this case did not threaten the under-

lying policies of Rule 6(d) to preserve grand jury secrecy and to avoid intimidation from the presence of unauthorized persons. Moreover, the joint testimony concerned a superseding indictment that made minor changes in the conspiracy charges preferred against these defendants; in fact, the original and unchallenged indictment would have been sufficient to allow the government at trial to prove the unalleged overt acts that were added in the superseding indictment that the defendants contest. Finally, every material statement in the joint testimony was supported by independent and untainted evidence before the grand jury. Thus, as the district court found, "the grand jury would * * * undoubtedly have returned the very same second indictment even had [the DEA agents] testified separately" (Pet. App. 51a). In these circumstances, the violation of Rule 6(d) was assuredly nonprejudicial and provides no basis for setting aside the indictment and convictions.

ARGUMENT

It is important to make clear at the outset what is not involved in this case. There is no dispute that defendants Mechanik and Lill were convicted by the petit jury at a fair trial based on proof beyond a reasonable doubt.[14] Nor is it claimed that the joint grand jury testimony of DEA Agents Rinehart and James affected the fairness of that trial in any way. Compare *United States* v. *Morrison,* 449 U.S. 361, 365-366 n.2 (1981). In addition, the courts below did not suggest, and Mechanik and Lill do not contend, that the agents' joint testimony violated the Grand Jury Clause of the Fifth Amendment. See also *Walker* v. *Estelle,* 525 F.2d 648, 649 (5th Cir. 1976). This case therefore presents no constitutional question of a defendant's right to indictment by a grand jury. Finally, we have not sought review of the holding below that

[14] Indeed, as the district court commented (C.A. App. A1713):

> [P]erhaps the energy with which the * * * convicted defendants have catalogued and argued governmental misconduct betrays an essential weakness in their cases. Were it not for governmental errors or misconduct, which the court has found to be in the end harmless, the defense offered by the convicted defendants would have been minimal.

the joint testimony violated Fed. R. Crim. P. 6(d). Thus, no issue is before the Court of the Rule's substantive standard. Compare *Hobby* v. *United States,* No. 82-2140 (July 2, 1984) slip op. 3.

Accordingly, the sole question here is the remedial one of the consequences that attach to a breach of Rule 6(d). The Rule itself is silent on this issue. Nevertheless, the court of appeals concluded that violation of Rule 6(d) requires that an indictment be set aside, and an otherwise valid conviction by a petit jury be reversed, wholly without regard to whether the defendant was prejudiced by the violation. This judicially-created remedy is inconsistent with the limited role of the grand jury in the federal system and the narrow purposes of Rule 6(d). Moreover, the court of appeals' decision would substantially burden the criminal justice process without providing commensurate benefits to innocent criminal defendants that might justify its costs. In our view, there is no place in federal criminal procedure for a rule of per se dismissal that results in such unjustified systemic costs and confers windfall benefits on defendants who have properly been convicted upon proof beyond a reasonable doubt at a fair and untainted trial.

We submit (1) that a procedural irregularity before the grand jury, such as a violation of Rule 6(d), is never a sufficient basis for dismissing a facially valid indictment returned by a legally constituted and unbiased grand jury; (2) that, even if such an irregularity would entitle a defendant to obtain dismissal of an indictment before trial, it would not warrant reversal of an otherwise valid conviction; and (3) that, in any event, dismissal of an indictment either before or after trial is an inappropriate sanction in the absence of prejudice to the substantial rights of the defendant.

I. A PROCEDURAL IRREGULARITY IN THE GRAND JURY DOES NOT JUSTIFY THE DISMISSAL BEFORE TRIAL OF A FACIALLY VALID INDICTMENT RETURNED BY A LEGALLY CONSTITUTED AND UNBIASED GRAND JURY

A. Allowing An Indictment To Be Dismissed For Procedural Error Is Not Warranted In View Of The Limited Function Served By The Grand Jury And The Costs That Recognizing A Dismissal Remedy Would Impose On The Criminal Justice System

As the Court has explained, the grand jury has two purposes in the federal system of criminal procedure.[15] First, in accordance with its historical origin, [16] the grand jury performs an investigative function "as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing." *United States* v. *Calandra,* 414 U.S. 338, 343 (1974). In this capacity, the grand jury is " 'an important instrument of effective law enforcement' " (*id.* at 344, quoting *Branzburg* v. *Hayes,* 408 U.S. 665, 701 (1972)) and " 'implements a fundamental governmental role of securing the safety of the person and property of the citizen' " (*Calandra,* 414 U.S. at 344, quoting *Branzburg,* 408 U.S. at 700). Second, the grand jury has also evolved as "a protector of citizens against arbitrary and oppressive governmental action * * * [in bringing] unfounded criminal prosecutions." *Calandra,* 414 U.S. at 343. It thus acts as "a shield against arbitrary accusations" (*United States* v. *Mandujano,* 425 U.S. 564, 572 (1976) (plurality opinion)) by " 'determin[ing] whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.' " *Branzburg,* 408 U.S. at 687 n.23, quoting *Wood* v. *Georgia,* 370 U.S. 375, 390 (1962).[17] Taken together, the respon-

[15] The Constitution does not require that state criminal prosecutions be initiated by grand jury indictment. See *Branzburg* v. *Hayes,* 408 U.S. 665, 688 n.25 (1972); *Hurtado* v. *California,* 110 U.S. 516 (1884).

[16] See, *e.g., Ex parte Bain,* 121 U.S. 1, 10-11 (1887); *Hurtado* v. *California,* 110 U.S. at 529-530; T. Plucknett, *A Concise History of the Common Law* 112-113, 126-127 (5th ed. 1956); Note, *The Grand Jury as an Investigatory Body,* 74 Harv. L. Rev. 590, 590 (1961).

[17] The Court has had occasion to note that the grand jury may no longer in fact "serve its historical role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States* v. *Dionisio,* 410 U.S. 1, 17 (1973); see also *United States* v. *Mara,* 410 U.S. 19, 45-46 (1973) (Marshall, J., dissenting).

sibilities of the grand jury are "to inquire into the existence of possible criminal conduct and to return only well-founded indictments." *Branzburg,* 408 U.S. at 688.

In this case, the defendants do not challenge the authority, the composition, or the impartiality of the grand jury that indicted them. Nor do they challenge the facial sufficiency of the charges contained in the indictment. Accordingly, the issue of dismissal is governed by the rule, long recognized by this Court, that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States,* 350 U.S. 359, 363 (1956) (footnote omitted). See also *Calandra,* 414 U.S. at 344-345; *Lawn* v. *United States,* 355 U.S. 339, 349 (1958); *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 599 (1950); *Ex parte United States,* 287 U.S. 241, 250 (1932); *Holt* v. *United States,* 218 U.S. 245 (1910); *Beavers* v. *Henkel,* 194 U.S. 73, 84-85, 88 (1904); *Bracy* v. *United States,* 435 U.S. 1301, 1303 (1978) (Rehnquist, Circuit Justice).[18]

The *Costello* rule is a cardinal principle of federal criminal procedure and reflects two fundamental considerations. The first is that the grand jury plays only a discrete and limited role in the overall criminal justice system. By its very nature, the grand jury is simply a preliminary step in the prosecution process. "A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra,* 414 U.S. at 343. Instead, the grand jury is merely a screening mechanism to determine whether there is a sufficient basis to require the suspect to stand trial before a petit jury.[19]

[18] To similar effect, the Court has said that a presumption of regularity attaches to grand jury proceedings. *Hamling* v. *United States,* 418 U.S. 87, 139 n.23 (1974).

[19] See *Calandra,* 414 U.S. at 343-344, 349; *United States* v. *Washington,* 431 U.S. 181, 191 (1977); *Hannah* v. *Larche,* 363 U.S. 420, 449 (1960); *Ewing* v. *Mytinger & Casselberry,* 339 U.S. at 599; *Bracy,* 435 U.S. at 1302.

In contrast to the panoply of stringent procedural and evidentiary safeguards applicable at a criminal trial, the grand jury is a much less formal and structured proceeding that is not patterned on the traditional adversarial process. See *Calandra*, 414 U.S. at 349. For example, the grand jury conducts its investigation ex parte and receives evidence only from the prosecutor; neither the suspect nor his attorney is entitled to appear before the grand jury to testify or present argument, to adduce affirmative evidence, or to cross-examine witnesses or otherwise rebut the prosecutor's presentation.[20] The rules of evidence do not apply, and the grand jury is free to consider hearsay or other incompetent evidence as well as evidence that was illegally obtained;[21] the competency and adequacy of the evidence before the grand jury is not open to judicial review,[22] and indeed grand jurors are not confined to the evidentiary record but "may act on

[20]See, *e.g.*, *Calandra*, 414 U.S. at 343-344; *Hannah* v. *Larche*, 363 U.S. at 449; *United States* v. *Pabian*, 704 F.2d 1533, 1538-1539 (11th Cir. 1983). Likewise, the prosecutor is not required to impeach his own witnesses or present exculpatory evidence on behalf of the suspect. See, *e.g.*, *United States* v. *Jones*, 756 F.2d 994, 998 n.1 (6th Cir. 1985), petition for cert. pending, No. 85-398; *United States* v. *Adamo*, 742 F.2d 927, 936-938 (6th Cir. 1984), cert. denied, No. 84-5637 (Jan. 21, 1985); *United States* v. *Sutton*, 732 F.2d 1483, 1488-1489 (10th Cir. 1984), cert. denied, No. 84-197 (Jan. 14, 1985); *United States* v. *Hyder*, 732 F.2d 841, 844 (11th Cir. 1984); *United States* v. *Levine*, 700 F.2d 1176, 1180-1181 (8th Cir. 1983); *United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); *United States* v. *Sweeney*, 688 F.2d 1131, 1138-1139 (7th Cir. 1982); *United States* v. *Cederquist*, 641 F.2d 1347, 1353 n.3 (9th Cir. 1981); but see *United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979).

[21] See, *e.g.*, Fed. R. Evid. 1101(d)(2); *United States* v. *Calandra*, *supra*; *United States* v. *Blue*, 384 U.S. 251, 255 & n.3 (1966); *Lawn* v. *United States*, *supra*; *Costello* v. *United States*, *supra*; *Holt* v. *United States*, *supra*; *United States* v. *Murphy*, 768 F.2d 1518, 1533 (7th Cir. 1985); *United States* v. *Rogers*, 751 F.2d 1074 (9th Cir. 1985); *United States* v. *Bein*, 728 F.2d 107, 113 (2d Cir. 1984); *United States* v. *Nembhard*, 676 F.2d 193, 199 (6th Cir. 1982), cert. denied, 464 U.S. 823 (1983); but see *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972).

[22] See, *e.g.*, *Calandra*, 414 U.S. at 345; *Costello*, 350 U.S. at 363; *Murphy*, 768 F.2d at 1533-1534; *Adamo*, 742 F.2d at 939.

tips, rumors, * * * or their own personal knowledge." *United States* v. *Dionisio*, 410 U.S. 1, 15 (1973).[23] The standard governing the grand jury's deliberations is probable cause, not proof beyond a reasonable doubt, and, unlike the requirement of juror unanimity at a federal criminal trial, an indictment may be returned if as few as 12 of 23 grand jurors concur. See Fed. R. Crim. P. 6(a), (b)(2), and (f). And in the event that a grand jury declines to charge a suspect, the prosecutor may re-present the case and obtain an indictment from a subsequent grand jury.[24].

Thus, the grand jury provides a flexible means to screen out at the beginning of the criminal process those cases in which charges against a suspect would be unfounded. Its essential characteristic is a kind of "rough justice" approach to determine whether further proceedings would be unwarranted, and this orientation sharply distinguishes it from the trial before the petit jury on the merits of guilt or innocence.

The second factor underlying the *Costello* rule is the recognition that, in light of the nature and function of the grand jury, it would impose significant and unjustified costs on the criminal justice system to subject indictments to searching pre-trial scrutiny and allow them to be dismissed for procedural irregularity. See *United States* v. *Murphy*, 768 F.2d 1518, 1533-1534 (7th Cir. 1985); M. Frankel & G. Naftalis, *The Grand Jury* 72, 83 (1977). Litigation over these issues would entail a substantial expenditure of prosecutorial and judicial resources and would impede the prompt adjudication of the central question in the case—the defendant's guilt or innocence. As the Court reasoned in *Costello*, 350 U.S. at 363:

> If indictments were to be held open to challenge on the ground * * * [of procedural irregularity], the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine * * * [the existence and effect of an irregularity].

[23] See also, *e.g.*, *Costello*, 350 U.S. at 362.

[24] See, *e.g.*, *Ex parte United States*, 287 U.S. 241, 250-251 (1932); *United States* v. *Thompson*, 251 U.S. 407, 413-415 (1920); *United States* v. *Claiborne*, 765 F.2d 784, 794 (9th Cir. 1985); *United States* v. *Pabian*, 704 F.2d 1533, 1537 (11th Cir. 1983).

Moreover, such challenges, if sufficient to invalidate an indictment, would predictably be raised with great frequency in criminal cases, especially those in which the grand jury's investigation was lengthy and complex. The possibility of some imperfection in a grand jury proceeding is all too easy to imagine and allege, and defendants ordinarily have every incentive to seek to defeat or at least delay the prosecution as well as to obtain discovery not otherwise available concerning the government's case. Motions to dismiss indictments for possible grand jury irregularity, and to produce grand jury transcripts to determine the propriety of the charging proceeding, are already common fare in the federal system, and indeed trial practice guides for defense counsel specifically refer to the numerous tactical advantages of such pre-trial motions.[25] These concerns are aptly illustrated by the instant case, in which the defendants simply filed a boilerplate motion to discover grand jury minutes in a "fishing expedition" to uncover possible grounds for dismissing the indictment (see J.A. 45).

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[25] See, *e.g.*, 1 A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 172 (1984); 1 M. Eisenstein, S. Allen, & D. Winston, *Criminal Defense Techniques* § 6A.02[5] (1985); B. Gershman, *Prosecutorial Misconduct* §§ 2.1-2.9 (1985); National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 13.4(b)(1) (3d ed. 1985). In fact, one authority, although acknowledging that this course might not succeed in preventing prosecution "in light of the probabilities of reindictment," nevertheless goes on to note the tactical advantages of filing such motions:

> [K]nocking out an indictment is often a victory that demoralizes the prosecution considerably and commensurately improves the bargaining posture of the defense. * * * Fringe benefits of the motions to quash or dismiss should also not be ignored: (a) If denied, they leave a claim of error that may be pressed on appeal from conviction; (b) if granted, they ordinarily delay the trial at least one criminal term (which may, of course, be a blessing or a bane, depending on the circumstances of the defense); and (c) whether granted or denied, they may occasion some inquiry into the proceedings before the grand jury (perhaps even serving as the basis for a defense request to examine all or portions of the grand jury transcript), knowledge of which may enable counsel to gain some measure of informal discovery of the prosecution's case.

A. Amsterdam, *supra*, at 1-193 to 1-194.

In addition to such litigation costs, pretrial dismissal of indictments would impose a further systemic burden because of the need to conduct a new grand jury proceeding to seek the reindictment of the defendant. Procedural irregularity before the first grand jury does not entitle the defendant to immunity from prosecution, and any dismissal of the indictment should be without prejudice to reinstituting the charges.[26] Especially since a dismissal like the one sought in this case would not prevent a new grand jury from considering the same evidence as was before the previous grand jury, it seems most unlikely, as Mechanik and Lill concede (Br. 14), that a subsequent grand jury would not find an adequate basis to reindict the defendant in virtually every case. The costs of this repetitive process for those involved—the victims of the crime, other witnesses before the grand jury, citizens required to serve as grand jurors, and the government prosecutor and investigators—cannot be ignored. Nor, contrary to the assumption of some courts that have considered the Rule 6(d) issue,[27] are these costs minor or inconsequential. Federal grand juries are authorized to sit for 18 months or more, and their investigations—which can span the life of more than one grand jury—often probe extremely complex and extensive criminal enterprises and involve the testimony of large numbers of witnesses and the introduction of voluminous documentary and physical evidence;[28] to duplicate such a presentation in a second grand jury pro-

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[26] See, *e.g.*, *United States* v. *Reed*, 726 F.2d 570, 578 (9th Cir. 1984), cert. denied, No. 83-1912 (Oct. 1, 1984); *United States* v. *Fulmer*, 722 F.2d 1192, 1195-1196 (5th Cir. 1983); see also *United States* v. *Blue*, 384 U.S. 251, 255 & n.3 (1966); A. Amsterdam, *supra*, at 1-193.

[27] See, *e.g.*, *Latham* v. *United States*, 226 F. 420, 422 (5th Cir. 1915); *United States* v. *Treadway*, 445 F. Supp. 959, 964 (N.D. Tex. 1978).

[28] See Fed. R. Crim. P. 6(g); see also, *e.g.*, *United States* v. *Kilpatrick*, 594 F. Supp. 1324 (D. Colo. 1984), appeal pending, No. 84-2481 (10th Cir.) (dismissal of 27-count indictment returned after 21-month grand jury investigation); *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181, 1184 & n.3 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983) (reversal of dismissal on Rule 6(d) grounds of 57-count indictment returned after 18-month grand jury investigation).

ceeding could be exceedingly difficult and burdensome.[29] And even in less complicated prosecutions, these costs would frequently be substantial; in this case, for instance, nearly 30 witnesses testified before the grand jury in connection with the original indictment (see page 3, *supra*).

Conversely, dismissal of indictments for procedural irregularity, while requiring the criminal justice system to bear significant costs, would add little if anything to the basic soundness and fairness of the process. Judicial review of the workings of the grand jury does nothing to safeguard the defendant's rights at trial or contribute to the integrity and accuracy of the petit jury's eventual determination. Furthermore, even with respect to the grand jury's pretrial screening function, it is most improbable that a procedural error of the sort at issue here would undermine the reliability of the determination of probable cause or render the trial on the indictment "oppressive" and "unfounded" (*Calandra*, 414 U.S. at 343). And, as noted above, the end result of such a dismissal is likely to be that the defendant will simply be reindicted by a subsequent grand jury. Perhaps it is conceivable that there would once in a great while actually be a case in which there has been a serious irregularity that, when eliminated on re-presentment of the case, would result in a refusal by the grand jury to indict; but the abstract possibility of such rare and isolated occurrences is too slight to justify the costs associated with allowing all defendants to challenge their indictments.

Just as there is no perfect trial,[30] so too there is no perfect grand jury proceeding. Given the limited role of the grand jury as a preliminary step in the criminal process, its proceedings should not be allowed to become "fertile ground to

[29] For example, if only one grand jury were sitting in a district and that jury were found to have been tainted by the presentation of evidence in violation of Rule 6(d), it would be necessary to convene a separate grand jury solely for the purpose of seeking a new indictment in one case.

[30] See, *e.g.*, *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 552-553 (1984); *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983).

be combed for evidentiary or other error." *United States* v. *Bari*, 750 F.2d 1169, 1176 (2d Cir. 1984), cert. denied, No. 84-6261 (June 17, 1985). To permit an indictment to be contested on the basis of procedural irregularity, even though it is facially valid and was returned by a legally constituted and unbiased grand jury, would given undue emphasis to the grand jury's role and require the system to devote excessive resources to monitoring the grand jury's performance—resources that would be disproportionate to the negligible or nonexistent benefits obtained and that could be better utilized in other phases of the criminal justice process.

As the Court has noted in other contexts, the "trial on the merits [should be] the 'main event' " (*Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)), and "the prominence of the trial itself" (*Engle* v. *Isaac*, 456 U.S. 107, 127 (1982)) should not be overshadowed by a focus on other stages of the proceeding. See also *Anderson* v. *Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 9-10. In our view, the systemic costs of dismissing indictments for procedural irregularity are sufficiently evident and substantial, and the absence of corresponding benefits sufficiently clear, that dismissals on such grounds should not be permitted. Cf. *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 10; *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 21; *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 9-10. The Court's conclusion in *Costello* is thus controlling (350 U.S. at 364):

> In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

In fact, the courts of appeals have generally rejected claims that an indictment should be dismissed prior to trial on the ground of a procedural error in the grand jury proceeding. These courts have recognized that "[b]ecause it is a drastic step, dismissing an indictment"—even before trial—"is a disfavored remedy" (*United States* v. *Rogers*, 751 F.2d 1074, 1076-1077 (9th Cir. 1985)) and involves "an 'extreme sanction which should be infrequently utilized.' " *United States* v.

Pabian, 704 F.2d 1533, 1536 (11th Cir. 1983) (citation omitted). In view of the limited and preliminary function performed by the grand jury, courts of appeals have reversed district courts' pretrial dismissals of indictments based on prejudicial gestures or remarks by the prosecutor,[31] an expression of the prosecutor's personal opinion that an indictment was warranted,[32] a misstatement of the law on the vote needed to return an indictment,[33] and a prosecutorial conflict of interest.[34] These decisions serve to illustrate that an indictment should not be subject to pretrial dismissal because of a procedural violation at the grand jury stage.

Finally, dismissal of the indictment is not necessary in order to enforce the procedural rules applicable to grand juries. Allowing a defendant to obtain dismissal does nothing to help detect violations of Rule 6(d) in the first instance (see Pet. App. 10a (Wilkinson, J., dissenting)); rather, as this case typifies, a defendant will normally not be given access to grand jury materials under Fed. R. Crim. P. 6(e)(3)(C)(ii) on the basis of a conclusory and unsupported assertion of impropriety, and therefore he is usually in a position to argue for dismissal only after a violation has otherwise been uncovered. In this sense, the defendant is a "freerider," and relief to him cannot be justified on the theory that it provides a necessary incentive to ferret out breaches of the Rule. Moreover, as the district court pointed out, such violations as do occur can be revealed in a variety of ways entirely unrelated to dismissal on Rule 6(d) grounds, including the disclosure of grand jury transcripts under the Jencks Act, 18 U.S.C. 3500, and the "frequen[t occasions on] which the court is called upon to review grand jury material for various *in*

[31] See *Pabian*, 704 F.2d at 1539-1540; *United States* v. *McKenzie*, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); *United States* v. *Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981).

[32] See *McKenzie*, 678 F.2d at 632-633; *Cederquist*, 641 F.2d at 1353.

[33] See *McKenzie*, 678 F.2d at 633.

[34] See *In re Perlin*, 589 F.2d 260, 263-268 (7th Cir. 1978).

camera purposes" (Pet. App. 52a-53a).[35] Thus, there simply is not a sufficient problem of unrevealed and recurring grand jury irregularities to justify allowing defense dismissal motions as a needed means—like the Fourth Amendment exclusionary rule is thought to be—to detect and deter improprieties. Cf. *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 25 n.25.

Similarly, remedies other than dismissal of the indictment are available to ensure compliance with grand jury procedural requirements. For example, Fed. R. Crim. P. 6(e)(2) specifically provides that "[a] knowing violation of Rule 6 may be punished as a contempt of court." [36] See also 18 U.S.C. 401. Other sanctions might include directing the prosecutor to show cause why he should not be disciplined, requesting the Department of Justice to initiate a disciplinary proceeding against the prosecutor, or publicly chastising the prosecutor in the court's opinion. See *United States* v. *Hasting*, 461 U.S. 499, 506 n.5 (1983). The district court below also devised a remedy—requiring the government in future cases to certify to the court that Rule 6(d) is being observed (see page 8, *supra*)—that would be permissible in appropriate circumstances and would appear to be at least as effective as dismissal in bringing about prospective compliance with the Rule.[37] Because these alternatives focus on

[35] Additional means would include the prosecutor's production of exculpatory information in grand jury materials pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), statements from grand jury witnesses about the proceedings that took place in their presence, complaints by grand jurors to the supervising judge about perceived improprieties, and a prosecutor's possible ethical obligations to advise the court or appropriate officials of the Department of Justice concerning violations of legal requirements of which he becomes aware.

[36] Indeed, the fact that Rule 6(e)(2) provides contempt as the only express sanction for breach of the Rule may suggest that the remedy of dismissal was not contemplated. See, *e.g.*, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[37] Because the infraction here appears to have been due to nothing more than a failure to appreciate the requirements of the Rule, there is no reason to suppose that anything beyond advice of the correct practice is necessary to prevent repetition of Rule 6(d) violations by the United States Attorney.

the person responsible for the procedural violation and do not impose unjustified costs on the criminal justice system, they are clearly preferable to the remedy of dismissal and better comport with "the general rule" that, even in cases of constitutional error, the "remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); see also *Rushen* v. *Spain*, 464 U.S. 114, 118-120 (1983); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966); *United States* v. *Jones*, 766 F.2d 994, 1000-1001 (6th Cir. 1985), petition for cert. pending, No. 85-398. Where, as here, the procedural defect is not of constitutional magnitude and the issue of relief implicates society's compelling interest in the prompt and efficient enforcement of the criminal law, it is especially important that judicial remedies be carefully drawn to balance the competing considerations on both sides.

Nor may the supervisory power of the judiciary be properly invoked to justify dismissal where that remedy would not be warranted under Rule 6(d) itself. First, the district court specifically found (see pages 6-7 note 11, *supra*) that the government did not act in bad faith in this case or seek to deceive the grand jury by use of the joint testimony. Compare *Morrison*, 449 U.S. at 366 n.2. Likewise, there has been no showing of "a pattern of recurring violations * * * that might warrant the imposition of a more extreme remedy in order to deter further lawlessness" (*ibid.*), and indeed the defendants acknowledge (Br. 9) that violations of Rule 6(d) are "rare." But most importantly, this Court has rejected the proposition that courts can employ their supervisory power to circumvent controlling legal principles and provide remedies that would otherwise be improper. As explained in *United States* v. *Payner*, 447 U.S. 727, 736, 737 (1980):

> The values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of [directly under the provision that has been violated].
>
> * * * * *
>
> Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.

Thus, to the extent that, as we have argued, the relative costs and benefits do not justify dismissal of the indictment under Rule 6(d), the same result would apply under a court's supervisory power. There is no more reason for the exercise of supervisory power in this case than in the Court's other grand jury cases in which defendants have unsuccessfully sought to invoke such authority. See *Hobby* v. *United States*, No. 82-2140 (July 2, 1984), slip op. 10; *Costello*, 350 U.S. at 363-364.

B. The Policies Of Rule 6(d) Do Not Justify Dismissal Of An Indictment

The above general principles control the issue in the case. As we now discuss with specific reference to Rule 6(d), nothing in the nature of that Rule justifies carving out an exception to the *Costello* principle barring attacks on indictments for alleged procedural irregularities; on the contrary, there is if anything considerably less reason to permit such challenges where nothing more serious than a Rule 6(d) infraction is alleged.

The Advisory Committee notes to Rule 6(d) do not explain the rationale for the "one witness" provision. However, three possible purposes have been suggested.[38] First, because a witness is not subject to a requirement of secrecy concerning grand jury proceedings,[39] the presence of two witnesses would allow each to disclose the testimony of the other and thus impair the secrecy of the grand jury. Second, like the sequestration of witnesses at trial, the Rule may help to prevent the testimony of a witness from being influenced either

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[38] See, *e.g.*, Pet. App. 38a, 40a, 43a; *United States* v. *Kazonis*, 391 F. Supp. 804, 805 (D. Mass. 1975), aff'd, 530 F.2d 962 (1st Cir.) (Table), cert. denied, 429 U.S. 826 (1976); *United States* v. *Bowdach*, 324 F. Supp. 123, 124 (S.D. Fla. 1971).

[39] See Fed. R. Crim. P. 6(e)(2) and 1946 Advisory Committee note; *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983).

by his knowledge of other witnesses' testimony or by the presence of other witnesses while he is testifying. Third, the required exclusion may guard against intimidation of the grand jurors by the presence of numerous prosecution witnesses. None of these policies supports the proposition that a defendant is entitled to dismissal of the indictment for a violation of Rule 6(d).

As the Court has noted, the rule of grand jury secrecy serves several different purposes:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. *Procter & Gamble Co.*, 356 U.S. 677, 681-682 n.6 (1958) (citation omitted); see also, *e.g.*, *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 566-567 & n.11 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 219 & n.10 (1979). However, these objectives relate either to the effective operation of the grand jury and the criminal justice system or to the protection of innocent suspects who are investigated but not charged by the grand jury; an indicted defendant has no personal stake in the furtherance of these policies that would justify dismissal of the indictment against him. Thus, the defendant does not have "standing" to assert the systemic concerns that a breach of secrecy might allow those not yet indicted to escape, impede the willingness of the government's witnesses to testify freely before the grand jury, enable those being investigated to intimidate the grand jurors or suborn perjury by witnesses, or disclose the identity

of innocent people who were under investigation but ultimately not named in an indictment. While a violation of grand jury secrecy is surely a serious matter, it is not a ground that a defendant should be allowed to invoke for dismissal of the indictment. See *United States* v. *Navarro-Ordas*, 770 F.2d 959, 968 (11th Cir. 1985).[40]

Likewise, the possibility that the testimony of the witnesses might be affected by their joint appearance does not justify invalidation of the indictment. In essence, this objection is a challenge to the character of the evidence presented to the grand jury. See *United States* v. *Murphy*, 768 F.2d 1518, 1533-1534 (7th Cir. 1985). Under *Costello* and its progeny, however, a defendant is not entitled to contest the quality or adequacy of the evidence heard by the grand jury (see pages 18-19, *supra*). Indeed, since the government is free to use hearsay evidence and thus could dispense with the live testimony of one of the witnesses altogether, it is impossible to understand how the appearance of that witness jointly with another could materially impair the grand jury process or entitle the defendant to a dismissal of the charges.

The district court believed (Pet. App. 41a) that the joint testimony of Agents Rinehart and James gained "added persuasiveness" because the witnesses were able "instantly to supplement each other's testimony," and that their simultaneous appearance "tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of [each of them]." It seems to us at least as plausible to suppose that joint witness appearances would actually facilitate the grand jury's ability to assess their testimony. But even accepting that adverse effects on grand jury fact-finding are possible, that would not provide a legal basis for a defendant to obtain dismissal. The court's observations could be even more plausibly applied to a prosecutor's decision to present only hearsay evidence to the grand jury; the grand

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[40] Moreover, as we discuss below (see page 50, *infra*), and as the district court found (Pet. App. 40a), "the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case." Our point here is that even if the secrecy of a grand jury were threatened, that would provide no basis for dismissing the indictment against a defendant.

jurors' ability to assess the credibility and personal knowledge of the declarants is thereby substantially impeded. And something similar might be said of a prosecutor's use of incompetent, unconstitutionally obtained, or "tainted" evidence; in each such instance the grand jurors' ability to assess the strength of the government's case is reduced or distorted by the government's reliance on evidence that will be inadmissible at trial. Nonetheless, in all of these cases, an indictment by a legally constituted and unbiased grand jury is not subject to challenge on such a ground. The simultaneous presence of two witnesses before the grand jury is if anything far less weighty a reason to dismiss an indictment than were the evidentiary flaws at issue in *Costello, Holt, Lawn,* or *Blue.*[41]

The final policy behind Rule 6(d) is that the grand jurors not be intimidated by the simultaneous presence of numerous prosecution witnesses. We do not quarrel with the proposition that a defendant is entitled to a grand jury that is free from coercion and intimidation in its consideration of the issue of probable cause. Thus, one can perhaps imagine cases in which the presence of nontestifying government personnel or other individuals would so far impair the decorum of the proceeding and undermine the grand jury's proper functioning that the defendant's right to an independent and unbiased grand jury would be violated[42] and a basis could exist for pretrial dismissal of the indictment. Such an occurrence, however, is far removed from the Rule 6(d) violation in this case or in virtually any case that can realistically be imagined. While Rule 6(d) embodies a policy choice that it is better for witnesses to testify individually, that by no means indicates that a failure to observe the Rule thwarts the grand jury process. And the concern that a defendant not be indicted by

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[41] We shall show below (see pages 51-53, *infra*) that the joint testimony of Agents Rinehart and James did not in fact result in prejudice to the defendants in the circumstances of this case. Our more general submission at this juncture is that any effect of a Rule 6(d) violation on the witnesses' testimony is legally insufficient to require that an indictment be dismissed.

[42] See, *e.g., Hobby* v. *United States,* No. 82-2140 (July 2, 1984), slip op. 4, 7; *United States* v. *Dionisio,* 410 U.S. 1, 16 (1973).

a cowed grand jury, which the prophylactic requirement of Rule 6(d) may to some extent help to prevent, hardly suggests that every violation of the Rule, without more, taints the indictment. The remedy formulated for violations of Rule 6(d) should not be disproportionate to the practical interests impinged by the underlying breach. Indeed, the prospect of the requisite egregious circumstances is sufficiently remote and unimaginable that it may safely be concluded as a matter of law that, at least in the absence of substantial aggravating factors, a violation of the "one witness" rule does not infringe any interest of a defendant that would justify dismissal of the indictment.

II. ONCE THE DEFENDANT HAS BEEN FOUND GUILTY BY THE PETIT JURY AT TRIAL, DEFECTS IN THE INDICTMENT PROCESS PROVIDE NO BASIS FOR REVERSING THE CONVICTION

In this case, defendants Mechanik and Lill were found guilty beyond a reasonable doubt by a petit jury at a fair trial that was untainted by the violation of Rule 6(d) in the grand jury proceeding. The court of appeals nevertheless dismissed the conspiracy count in the indictment and reversed the convictions on that charge because of the joint testimony at the grand jury stage. Even if, contrary to our preceding submission, a Rule 6(d) violation could afford a ground to dismiss an indictment prior to trial, there are powerful additional reasons why such a procedural irregularity could not justify dismissal of the indictment and reversal of a conviction after the defendant's guilt has been established at trial.

On the one hand, the societal costs of such post-conviction relief are even greater than those that would be imposed by a pretrial remedy. Most obviously, there is the cost of repeating an otherwise valid trial on the merits of the defendant's guilt or innocence. A criminal trial involves a substantial expenditure of resources. See *Engle* v. *Isaac,* 456 U.S. 107, 127 (1982); *Davis* v. *United States,* 411 U.S. 233, 241 (1973); cf. *Anderson* v. *Bessemer City,* No. 83-1623 (Mar. 19, 1985), slip op. 9; *McDonough Power Equipment, Inc.* v. *Greenwood,* 464 U.S. 548, 553, 555 (1984). It requires a commitment of the time and energy of the court and its staff, the prosecutor

and government investigatory personnel, and citizens called to participate as jurors or witnesses. In addition, for the victims of crime, the trial process can often be an "ordeal" that forces them to relive a painful and traumatic experience—a concern that, "in the administration of criminal justice, courts may not ignore." *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983); see also *United States* v. *Hasting*, 461 U.S. 499, 507, 509 (1983). "The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources" (*Morris* v. *Slappy*, 461 U.S. at 15). The price to the criminal justice system of retrying a defendant already reliably determined to be guilty cannot be accepted lightly.[43]

Moreover, these are not the only costs that result when a conviction is set aside and a new trial ordered. First, as a practical matter, a retrial will not always be feasible. "Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle* v. *Isaac*, 456 U.S. at 127-128; see also *Hasting*, 461 U.S. at 507; *Davis*, 411 U.S. at 241. Thus, while such relief "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution" (*Engle* v. *Isaac*, 456 U.S. at 128) and thereby "cost society the right to punish admitted offenders" (*id.* at 127). Furthermore, assuming that the retrial can proceed at all, similar problems—the passage of time, the dimming of memories, and the loss of some witnesses or evidence—may prevent the government from satisfying at the second proceeding, as it did at the first, the high standard of proof necessary to obtain a conviction. Finally, even if the defendant is again convicted, the intervening delay would be contrary to society's "interest in the prompt administration of

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[43] These considerations are well illustrated by the instant case, in which the defendants were convicted "after a three-month trial conducted at enormous expense to the United States and the defendants" (Pet. App. 51a).

justice" (*Hasting*, 461 U.S. at 509) and the dual law enforcement objectives of deterrence and rehabilitation (see *Engle* v. *Isaac*, 456 U.S. at 127 & n.32).

Accordingly, our legal system attaches "profound importance * * * [to] finality in criminal proceedings" (*Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 23), and it should not be made to bear the costs of a reversal of a conviction absent the most compelling reasons. Of course, there can be no question that, notwithstanding the costs, a new trial is necessary where an error has prejudiced the defendant's substantial rights and deprived him of a fair determination of guilt or innocence. See *Morris* v. *Slappy*, 461 U.S. at 14. The balance of interests decidely tips the other way, however, when the issue is post-trial reversal for a procedural error before the grand jury. In that circumstance, "the magnitude of the benefit conferred on * * * guilty defendants offends basic concepts of the criminal justice system." *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 9. As the district court below correctly understood, such post-trial relief would "confer[ ] * * * a windfall benefit on * * * [convicted] defendants" (Pet. App. 51a).

Once the defendant has stood trial and been convicted by the petit jury, he has no legitimate stake in obtaining review of the procedural regularity of the grand jury process. As explained above (see pages 16-19, *supra*), the aspect of the grand jury designed to benefit criminal suspects involves screening out unfounded charges that are not supported by probable cause and do not justify putting an individual to the burden and expense of trial. After a petit jury has rendered its verdict, the screening function of the grand jury is, both logically and practically, no longer relevant. If an impropriety in the grand jury has actually impaired the screening function and resulted in an unjustified indictment, the trial will result in an acquittal; for such a defendant, wronged though he may be, the remedy of reversal of a conviction is useless. On the other hand, with respect to the defendant who is convicted, the verdict establishes his guilt beyond a reasonable doubt and thus, *a fortiori*, the existence of probable cause to prosecute. See *United States* v. *Romano*, 706 F.2d 370, 374 (2d Cir. 1983); *Talamante* v. *Romero*, 620 F.2d 784, 791

(10th Cir.), cert. denied, 449 U.S. 877 (1980). The issue of probable cause merges into the judgment of conviction, and there is no room for concern that the defendant was subjected to trial on an insubstantial accusation. At that juncture, therefore, it is pointless to revisit the grand jury proceeding and undertake a hypothetical inquiry, as the court of appeals did here, into whether the procedural irregularity "could have" (Pet. App. 20a) influenced the grand jury's determination of probable cause. See *United States* v. *Murphy*, 768 F.2d at 1534. As Justice Stewart has explained:

> A grand jury proceeding * * * is not a proceeding in which the guilt or innocence of a defendant is determined, but merely one to decide whether there is a prima facie case against him. Any possible prejudice to the defendant * * * [in the grand jury proceeding] thus disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt. In short, a convicted defendant who alleges * * * [an error in the grand jury proceeding] is complaining of an antecedent * * * violation that could have had no conceivable impact on the fairness of the trial that resulted in his conviction.

Rose v. *Mitchell*, 443 U.S. 545, 575-576 (1979) (Stewart, J., concurring in the judgment) (footnote omitted).[44]

The Court's decision in *Rose* v. *Mitchell*, *supra*, does not foreclose this analysis. The Court there considered whether a conviction free of trial error should be set aside because per-

[44] In this sense, to engage in a post-conviction examination of the procedural regularity of the grand jury would be much like conducting a post-trial proceeding in a civil case to determine whether the losing party should have been granted summary judgment. See *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 713-715 (1983); cf. *Carey* v. *Piphus*, 435 U.S. 247, 260 (1978).

We reiterate that this case does not present the constitutional question of remedy where no grand jury indictment has been returned against a defendant or where the grand jury proceeding was so fundamentally defective as to be tantamount to the absence of an indictment. See page 14 and page 30 & note 42, *supra*. Accordingly, the Court need not consider the issue of post-trial relief in such situations.

sons of the defendant's race had been systematically excluded from service as grand jury foremen. The Court rejected, in that context, an argument similar to that we make in the instant case. However, in doing so, the Court did not reject the general proposition, put forward by Justice Stewart in concurrence and earlier by Justice Jackson in dissent in *Cassell* v. *Texas*, 339 U.S. 282, 298-305 (1950), that a defendant who has been convicted by a properly constituted petit jury can have "suffered no possible prejudice" from an error in the grand jury proceeding (443 U.S. at 552).[45]

The basis for the Court's holding in *Rose* was not that the defendant was actually injured by the discriminatory selection of the grand jury foreman, but that "discrimination on the basis of race in the selection of members of a grand jury * * * strikes at the fundamental values of our judicial system and our society as a whole" (443 U.S. at 556). The Court emphasized that "[d]iscrimination on account of race was the primary evil at which * * * the Fourteenth Amendment * * * [was] aimed" (id. at 554) and that such discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process" (*id.* at 555-556). In addition, the Court noted that its precedents had consistently reversed convictions because of racial discrimination at the grand jury stage "without inquiry into whether the defendant was prejudiced in fact by the discrimination" (*id.* at 556). Accordingly, without "deny[ing] that there are costs associated with this approach" (*id.* at 557), the Court con-

[45] The Court summarized Justice Jackson's argument as follows (443 U.S. at 552 (citations omitted)):

> Unlike the petit jury, the grand jury sat only to determine probable cause to hold the defendant for trial. It did not consider the ultimate issue of guilt or innocence. Once a trial court heard all the evidence and determined it was sufficient to submit the case to the trier of fact, and once that trier determined that the defendant was guilty beyond a reasonable doubt, Mr. Justice Jackson believed that it "hardly lies in the mouth of a defendant . . . to say that his indictment is attributable to prejudice." "Under such circumstances," he concluded, "it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict."

cluded that "such costs * * * are outweighed by the strong policy * * * of combating racial discrimination in the administration of justice" (*id.* at 558).[46]

This reasoning has no application in the present case. A procedural irregularity before the grand jury such as a violation of Rule 6(d) cannot in any sense be deemed the equal of unconstitutional racial discrimination that "strike[s] at the fundamental values of our judicial system and our society as a whole." Without minimizing the obligation to observe the grand jury procedures prescribed as a supervisory matter in the Federal Rules, there is no "strong policy" of enforcing Rule 6(d) that would justify reversals of valid convictions where the essential role of the grand jury has not been impaired. Moreover, this case, unlike *Rose* v. *Mitchell,* involves no question of the representativeness of the grand jurors or the existence of a legally constituted and unbiased grand jury. See 443 U.S. at 551, citing *Hill* v. *Texas,* 316 U.S. 400, 406 (1942); see also *Costello,* 350 U.S. at 363 & n.7, citing *Pierre* v. *Louisiana,* 306 U.S. 354 (1939); *Hobby* v. *United States,* No. 82-2140 (July 2, 1984), slip op. 6; *Peters* v. *Kiff,* 407 U.S. 493, 497 (1972) (plurality opinion); *Castaneda* v. *Partida,* 430 U.S. 482, 509-510 (1977) (Powell, J., dissenting). Finally, in contrast to the issue of racial discrimination, there is no "unbroken line of cases" over "nearly a century" (443 U.S. at 551) holding that a defendant is entitled to have his conviction set aside on the ground of a procedural defect in the grand jury. Compare *Rose* v. *Mitchell,* 443 U.S. at 593-594 (Stevens, J., dissenting in part); *Cassell* v. *Texas,* 339 U.S. at 290 (Frankfurter, J., concurring in the judgment); *id.* at 296 (Clark, J., concurring).

The Court has recently observed that, even in cases of constitutional error, "the general rule [is] that remedies should be tailored to the injury suffered from the * * * violation and should not unnecessarily infringe on competing interests."

[46] Significantly, in *Hobby* v. *United States,* No. 82-2140 (July 2, 1984), the Court refused to reverse the conviction of a white male who challenged the alleged exclusion of women and blacks from the position of federal grand jury foreman. The Court noted (slip op. 10) that "[l]ess draconian measures will suffice to rectify the problem."

United States v. *Morrison,* 449 U.S. 361, 364 (1981).[47] In the grand jury area, *Rose* v. *Mitchell* is a singular exception to this general rule in the unique context of racial discrimination. Where, as here, the special considerations underlying *Mitchell* are not present, the decision is inapplicable. See *United States ex rel. Bacon* v. *DeRobertis,* 728 F.2d 874, 875 & n.1 (7th Cir. 1984), cert. denied, No. 83-6765 (Oct. 1, 1984).[48]

Consistently with this analysis, the courts of appeals generally have refused to reverse otherwise valid convictions because of a procedural defect at the grand jury stage. "[T]he

[47] Because a procedural defect in the grand jury proceeding is rendered immaterial by the defendant's conviction at trial, such a claim of procedural error is simply without legal consequence in the criminal case and provides no basis for any relief to the defendant in that action. But even apart from the curative effect of the conviction, a defendant still should not be entitled to challenge his conviction on this ground. Rather, the most specific and tailored remedy for the grand jury violation would be to require that the government correct the error by re-presenting its case to a grand jury in compliance with Rule 6(d), but not to reverse a fair and untainted conviction if a procedurally regular indictment is obtained. Hence, once a fresh indictment is returned, the defendant's conviction would remain in effect. Cf. *Waller* v. *Georgia,* No. 83-321 (May 21, 1984), slip op. 9-11; *Coleman* v. *Alabama,* 399 U.S. 1, 10-11 (1970); *Brady* v. *Maryland,* 373 U.S. 83, 88-91 (1963). Of course, such a remedy would be of little practical benefit to the defendant. However, this Court has squarely rejected the notion that merely "because other remedies would not be fruitful" the courts must impose a disproportionately severe and needlessly punitive remedy. *Morrison,* 449 U.S. at 365-366 n.2.

[48] In *Vasquez* v. *Hillery,* cert. granted, No. 84-836 (Mar. 4, 1985), the Court is asked to reconsider its decision in *Rose* v. *Mitchell.* With respect to the issue in *Hillery,* it is the view of the United States that a valid conviction by a petit jury should not be reversed because of racial discrimination in grand jury selection. While the elimination of any remaining vestiges of discrimination in the criminal justice system is a goal of the highest order, the ruling in *Mitchell* fails to give sufficient weight to both the substantial societal interests that counsel against the reversal of valid convictions for errors at the grand jury stage and the availability of remedies other than dismissal for correcting the problem of discrimination where it continues to

courts generally have been most cautious in invalidating indictments for alleged grand jury misconduct of the prosecutor." *Beatrice Foods Co.* v. *United States*, 312 F.2d 29, 39 (8th Cir.) (Blackmun, J.), cert. denied, 373 U.S.904 (1963). These decisions recognize that the remedy sought—dismissal of an indictment—"is an extraordinary one. To dismiss an indictment because of misconduct means that even though a jury unanimously found the defendant guilty beyond a reasonable doubt * * * we should nevertheless void his conviction because the prosecution had made a misstep in obtaining a grand jury determination of probable cause." *United States* v. *Thibadeau*, 671 F.2d 75, 77-78 (2d Cir. 1982). See also *United States* v. *Bari*, 750 F.2d 1169, 1176 (2d Cir. 1984), cert. denied, No. 84-6261 (June 17, 1985). Such post-trial relief is inappropriate since the taint in the grand jury has been "purged by the deliberations of an untainted petit jury." *United States* v. *Brien*, 617 F.2d 299, 313 (1st Cir.), cert. denied, 446 U.S. 919 (1980).

Thus, for example, a conviction cannot be set aside on the ground that perjured testimony was included in the evidence submitted to the grand jury.[49] Likewise, a conviction is not to

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exist. These considerations have particular force in a case such as *Hillery*, where the defendant seeks on collateral attack to void a conviction more than two decades old on the basis of a challenge to grand jury practices that have been abandoned by the state and are no longer in effect. Accordingly, notwithstanding the government's contrary submission in *Mitchell*, we believe upon further consideration that the analysis followed in *Mitchell* is incorrect and that the decision should be overruled. Of course, if *Mitchell* is overturned, that would strongly support the analysis that we have presented here; on the other hand, if the special rule of *Mitchell* for racial discrimination claims is reaffirmed, that would not, for the reasons stated in the text, control the question in this case.

[49] See, *e.g.*, *United States* v. *Johnson*, 767 F.2d 1259, 1275 (8th Cir. 1985); *United States* v. *Claiborne*, 765 F.2d 784, 791-792 (9th Cir. 1985); *United States* v. *Adamo*, 742 F.2d 927, 935-936, 939-942 (6th Cir. 1984), cert. denied, No. 84-5637 (Jan. 21, 1985); *United States* v. *Udziela*, 671 F.2d 995, 1000-1001 (7th Cir. 1981), cert. denied, 457 U.S.1135 (1982); *Coppedge* v. *United States*, 311 F.2d 128, 131-132 (D.C. Cir. 1962) (Burger, J.), cert. denied, 373 U.S. 946 (1963); but see *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974).

be overturned on the basis of a legal error in the prosecutor's instructions to the grand jury.[50] Nor is a conviction subject to reversal because of prejudicial publicity at the time of the grand jury proceeding.[51] These decisions—which involved defects that in fact posed a greater risk to the independence and integrity of the grand jury than the Rule 6(d) violation in this case—lend strong support to the conclusion that a procedural irregularity in the grand jury proceeding is not a basis for reversing a valid conviction determined by the petit jury at trial.[52]

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[50] See *United States* v. *Wright*, 667 F.2d 793, 796 (9th Cir. 1982); *United States* v. *Battista*, 646 F.2d 237, 242 (6th Cir.), cert. denied, 454 U.S. 1046 (1981); *United States* v. *Linetsky*, 533 F.2d 192, 200 (5th Cir. 1976).

[51] See *United States* v. *Reed*, 726 F.2d 570, 578 (9th Cir. 1984), cert. denied, No. 83-1912 (Oct. 1, 1984); *United States* v. *Civella*, 648 F.2d 1167, 1173-1174 (8th Cir.), cert. denied, 454 U.S. 867 (1981); *United States* v. *Brien*, 617 F.2d 299, 313 (1st Cir.), cert. denied, 446 U.S. 919 (1980); *Silverthorne* v. *United States*, 400 F.2d 627, 634 (9th Cir. 1968).

[52] Mechanik and Lill contend (Br. 2, 4) that if a higher standard governs post-trial motions to dismiss than pretrial motions, it should not be applied here because their motion to resolve the Rule 6(d) issue prior to trial was improperly opposed by the government on the ground that no unauthorized person had been present in the grand jury (see page 5, *supra*). The district court specifically found, however, that the simultaneous testimony in this case was not presented in bad faith (see pages 6-7 note 11, *supra*), and the government's opposition to the defendants' motion was based on the same good-faith view that the joint appearance of Agents Rinehart and James did not violate Rule 6(d). Moreover, this legal position was initially sustained by the district court even after the fact of the joint appearance had become known (see pages 5-6, *supra*). In these circumstances, it cannot be suggested that the government wrongfully deprived the defendants of the opportunity for a resolution of the Rule 6(d) issue before trial. But even if they were wrongfully deprived of the opportunity to mount an effective pretrial challenge to their indictment, that would not alter the fact that the petit jury's verdict conclusively demonstrates that the Rule 6(d) violation produced no error in the grand jury's screening function, and that review of the issue at this juncture is therefore pointless. If there was governmental wrongdoing, the proper recourse would be disciplinary action against the responsible prosecutors.

III. ABSENT PREJUDICE, A DEFENDANT IS NOT ENTITLED AT ANY STAGE TO DISMISSAL OF AN INDICTMENT OR REVERSAL OF A CONVICTION BECAUSE OF A PROCEDURAL VIOLATION IN THE GRAND JURY

A. There Is No Justification For Exempting Rule 6(d) Violations From The General Principle That Relief Is Not Given For Harmless Errors

We have shown above that a procedural irregularity in the grand jury should not entitle a defendant to either dismissal of an indictment prior to trial or reversal of a conviction after trial. But even assuming that such a grand jury error could in some cases be a sufficient ground for relief, dismissal or reversal would be entirely unwarranted in the absence of prejudice to the defendant from the error. In this case, however, the court of appeals expressly held (Pet. App. 18a-20a) that prejudice is not required in order to set aside an indictment and overturn a conviction, and on that basis it vacated the conspiracy convictions of Mechanik and Lill. That ruling is fundamentally incorrect.

The "general rule" is now well settled that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate." *United States* v. *Morrison*, 449 U.S. at 364, 365. Indeed, as *Morrison* makes clear, the rule extends to constitutional violations and is applicable "even though the violation may have been deliberate" (*ibid.* (footnote omitted)). Because "[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression" (*id.* at 366), "[a]bsent * * * [an] impact on the criminal proceeding * * * there is no basis for imposing a remedy in that proceeding" (*id.* at 365). This basic principle of judicial review "recognize[s] the necessity for preserving society's interest in the administration of criminal justice" and the requirement that "remedies should be tailored to the injury suffered from the * * * violation and should not unnecessarily infringe on competing interests. * * * * * Our approach has thus been to identify

and then neutralize the taint by tailoring relief appropriate in the circumstances * * *" (*id.* at 364, 365). See also *Rushen* v. *Spain*, 464 U.S. 114, 118-120 (1983).[53]

Equally well settled is the rule of harmless error. This "Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States* v. *Hasting*, 461 U.S. at 509. [54] As relevant here, Fed. R. Crim. P. 52(a) provides that "[*a*]*ny* error, defect, irregularity or variance which does not affect substantial rights *shall* be disregarded" (emphasis added). Likewise, 28 U.S.C. 2111 states that "[o]n the hearing of any appeal * * *, the court *shall* give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties" (emphasis added). Cf. Fed. R. Civ. P. 61.

The parallel principles reflected in *Morrison* and *Hasting* rest on the recognition that "when courts fashion rules whose violations mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead "impregnable citadels

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[53] Cf. *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10, *id.* at 10-11, 14 (opinion of Blackmun, J.), and *id.* at 1 (White, J., concurring in part and dissenting in part) (failure to disclose *Brady* material is reversible error only if there is a sufficient possibility that the material would have affected the outcome of the trial); *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984) (to prevail on a claim of ineffective assistance of counsel, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872-873, 874 (1982) (showing of prejudice required where the government deported potential witnesses before they could testify for the defendant); *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978) (proof of actual prejudice an important element of claim of post-indictment delay under the Speedy Trial Clause); *United States* v. *Lovasco*, 431 U.S. 783 (1977) (proof of actual prejudice required before a court will consider a due process claim arising from pre-indictment delay); *Weatherford* v. *Bursey*, 429 U.S. 545, 554-557 (1977) (defendant's right to counsel not infringed where attorney-client information obtained by government informant had no effect on trial).

[54] See also *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 11 n.10; *Luce* v. *United States*, No. 83-912 (Dec. 10, 1984), slip op. 4; *Rushen* v. *Spain*, 464 U.S. 114, 118 n.2, 120 (1983); *Hamling* v. *United States*, 418 U.S. 87, 134-135 (1974); *Breese* v. *United States*, 226 U.S. 1, 11 (1912).

of technicality.'" *Hasting*, 461 U.S. at 509 (quoting R. Traynor, *The Riddle of Harmless Error* 14 (1970), and Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)). As the Court recently noted (*McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 5):

> We have * * * come a long way from the time when all trial error was presumed prejudicial * * *. The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial.

Judicial observance of these doctrines serves two essential purposes. First, the doctrines act as a reminder in criminal cases that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.). To reverse otherwise valid convictions for errors that did not prejudice the defendant could only "'generat[e] disrespect for the law and the administration of justice.'" *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 9 (quoting *Stone* v. *Powell*, 428 U.S. 465, 491 (1976)). Second, they conserve the scarce resources available to the system of justice by avoiding repeated proceedings that, in view of the harmlessness of the error, are not necessary to a fair and accurate determination of the controversy. See *McDonough Power Equipment, Inc.*, 464 U.S. at 553, 555; *Hasting*, 461 U.S. at 509.

In analyzing issues of procedural grand jury irregularity, the courts of appeals generally have recognized that there must be substantial prejudicial error before a defendant can be entitled to relief. Accordingly, even though courts have at times been more generous in entertaining attacks on indictments than we believe is appropriate, they have limited the remedy of dismissal, whether before or after trial, to "'flagrant cases'" in which "'the prosecutor's conduct

significantly infringed upon the ability of the grand jury to exercise its independent judgment.'" *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386, 1391, 1392 (9th Cir. 1983) (citations omitted), cert. denied, No. 465 U.S. 1079 (1984).[55] "[E]ven in the case of the most 'egregious prosecutorial misconduct,' the indictment may be dismissed only 'upon a showing of actual prejudice to the accused' * * * [from] overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury." *United States* v. *McKenzie*, 678 F.2d 629, 631 (5th Cir.) (citations omitted), cert. denied, 459 U.S. 1038 (1982). As the court explained in *United States* v. *Birdman*, 602 F.2d 547 (3d Cir. 1979), cert. denied, 444 U.S. 1032, 445 U.S. 906 (1980), "'dismissal of an indictment * * * is an extreme sanction which should be infrequently utilized'" (602 F.2d at 559 (citation and footnote omitted)), and "more appropriate remedies exist than a windfall dismissal for unharmed parties" (*id.* at 561 (footnote omitted)); "to attempt to serve a public interest in the purity of the grand jury proceeding, by the per se sanction of dismissing indictments, is to disserve another public interest by frustrating prosecutions of criminals" (*id.* at 558-559).[56]

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[55] As the court of appeals elaborated in *Sears, Roebuck & Co.* (719 F.2d at 1392), "[t]he relevant inquiry * * * focuses not on the degree of culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality."

[56] See also *United States* v. *Jones*, 766 F.2d at 1000-1001; *United States* v. *Adamo*, 742 F.2d at 941; *United States* v. *Hyder*, 732 F.2d 841, 845 (11th Cir. 1984); *United States* v. *Reed*, 726 F.2d 570, 579 (9th Cir. 1984), cert. denied, No. 83-1912 (Oct. 1, 1984); *United States* v. *Pino*, 708 F.2d 523, 530 (10th Cir. 1983); *United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); *United States* v. *Cederquist*, 641 F.2d 1347, 1352-1353 (9th Cir. 1981); *In re Perlin*, 589 F.2d 260, 266 (7th Cir. 1978). In *McKenzie*, the court of appeals held that a showing of actual prejudice is required "whether the court is acting under its supervisory authority or its duty to protect the constitutional rights of defendants" (678 F.2d at 631). See also *United States* v. *Griffith*, 756 F.2d 1244, 1249 (6th Cir. 1985) (same), cert. denied, No. 84-6876 (Oct. 7, 1985); *United States* v. *Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985) (same); cf. *United States* v. *Pabian*, 704 F.2d 1533, 1540 (11th Cir. 1983) (holding that prejudice must

Similarly, until the decision in this case, all but one of the courts of appeals to consider the issue had held that, in the absence of prejudice, it is an inappropriate remedy for a violation of Rule 6(d) to reverse a conviction and dismiss the indictment. See *United States* v. *Condo*, 741 F.2d 238, 239 (9th Cir. 1984), cert. denied, No. 84-5793 (Jan. 14, 1985); *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982); *United States* v. *Kazonis*, 391 F. Supp. 804, 805 (D. Mass. 1975), aff'd, 530 F.2d 962 (1st Cir.) (Table), cert. denied, 429 U.S. 826 (1976); *United States* v. *Rath*, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969).[57] In each of these cases, the courts considered the nature and circumstances of the violation and determined whether the error was prejudicial or harmless.[58] On the other hand, the decisions of the Fifth Circuit, like the holding below, indicate that a Rule 6(d) violation per se invalidates the indictment without regard to a showing of prejudice. See *Latham* v. *United States*, 226 F. 420 (5th Cir. 1915) (alternative holding); *United States* v. *Echols*, 542 F.2d 948, 951 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977) (dictum); see also *United*

be shown for dismissal on constitutional grounds, but leaving open whether prejudice is required for dismissal under supervisory powers); *United States* v. *Serubo*, 604 F.2d 807, 817-818 (3d Cir. 1979).

[57] In addition, an earlier panel of the Fourth Circuit, in *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (1982), cert. denied, 459 U.S. 1105 (1983), declined to require automatic dismissal of an indictment prior to trial for violations of Rule 6(d). Stating that "each situation should be addressed on a *sui generis* basis," the court found that the "invasions of the grand jury proceedings were rare, inadvertent and nonprejudicial to any defendant" (689 F.2d at 1184-1185 (footnote omitted)). The court concluded that "[i]t is simply inappropriate to nullify grand jury work * * * because of technical, trivial, harmless violations of no significant duration of Fed. R. Crim. P. 6(d)" (689 F.2d at 1186). While purporting to distinguish *Computer Sciences* (Pet. App. 19a-20a), the court below has in fact overruled it. See Pet. App. 12a (Wilkinson, J., dissenting).

[58] Because a violation of Rule 6(d) is not a constitutional error, the appropriate harmless-error standard is that of *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946), rather than the more stringent test of *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967).

States v. *Fulmer*, 722 F.2d 1192, 1195 (5th Cir. 1983); *Martin* v. *United States*, 266 F.2d 97, 99 (5th Cir. 1959) (no violation found because grand jury was not in session).[59]

These per se rulings are unfounded. First, they are irreconcilable with the general principle recognized outside the Rule 6(d) context that indictments are not to be dismissed in the absence of prejudice (see pages 42-43, *supra*). There is no reason to apply a more exacting standard to violations of Rule 6(d) than to other instances of prosecutorial error; on the contrary, as previously illustrated (see pages 38-39, *supra*), the latter frequently entail a more substantial threat to the grand jury process. And since this Court has held that even constitutional violations do not warrant relief if they result in no prejudice at trial, it is "inexplicable," as Judge Wilkinson commented in dissent in this case (Pet. App. 9a), how Rule 6(d) can be given a preferred position that requires per se dismissal.

Indeed, this Court has already rejected the notion that it should "adopt a strict approach [to the Federal Rules of Criminal Procedure] and declare that any noncompliance * * * requires reversal." *Hamling* v. *United States*, 418 U.S. 87, 134 (1974) (construing Fed. R. Crim. P. 30). The Court's analysis in *Hamling* is also apt here (418 U.S. at 134-135):

> We think such an approach would be unduly mechanical, and would be inconsistent with interpretation *in pari materia* of * * * [specific individual rules] and other relevant provisions of the Federal Rules of Criminal Procedure, since Rule 52(a) specifically provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This provision suggests the soundness of an approach * * * [that] examine[s] the prejudice to the defendant in deciding whether reversal is required * * *.

[59] Mechanik and Lill cite (Br. 10-11 n.9, 13-14) a string of district court cases in which indictments were dismissed on Rule 6(d) grounds. However, a number of these decisions have been disapproved by courts of appeals in other circuits. See, *e.g.*, *United States* v. *McKenzie*, 678 F.2d at 631, disapproving *United States* v. *Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977); *United States* v. *Birdman*, 602 F.2d at 566, disapproving

Moreover, the justifications offered by the court of appeals below for dispensing with a showing of prejudice in the Rule 6(d) context do not withstand analysis. First, the court stated (Pet. App. 19a) that "Rule 6(d) is plain and unequivocal in limiting who may appear before a grand jury." That consideration, however, is simply irrelevant. The clarity and strictness of the Rule may bear on the existence of a substantive violation vel non and on the prosecutor's culpability (see *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 n.14), but they do not illuminate the remedial issue of whether the error has "affect[ed] substantial rights" of the defendant (Fed. R. Crim. P. 52(a)). The point that is relevant, and undisputed, is that Rule 6 itself provides no sanction for a violation of the "one witness" provision nor indicates in any way that the usual standard of prejudicial error is to be ignored; indeed, as noted above (see page 25 note 36, *supra*), the express inclusion in the Rule of the sanction of contempt may suggest dismissal—and certainly the extraordinary remedy of dismissal without regard to prejudice—is not authorized for a Rule 6(d) violation.

Second, the court of appeals stated (Pet. App. 19a) that "[r]equiring a defendant to show prejudice would impose a difficult burden that could undermine the protection that the rule provides." But "[w]hile the determination of likely prejudice stemming from an unauthorized presence obviously entails some difficulty, it is doubtful whether that determination is substantially more speculative than the determination of prejudice made by courts considering whether other types of irregularities require dismissal of indictments." 2 W. LaFave & J. Israel, *Criminal Procedure* § 15.6, at 333 (1984)

United States v. *Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978). In addition, as the district court below correctly observed (Pet. App. 45a), these district court cases have simply "indiscriminately appl[ied] the *per se* rule" without independently considering its correctness. Moreover, in these cases "without exception * * * dismissal was ordered before trial" (*id.* at 52a (footnote omitted)), and thus they provide no support for reversal of a valid conviction determined by the petit jury at trial. Finally, we note that review was not sought in these cases because the government, in the exercise of its discretion, found it preferable and more expeditious in the particular circumstances to reindict rather than to appeal.

(footnote omitted).[60] Nor is there any more basis here for the court of appeals' concern than in other areas in which a similar argument has been rejected by this Court. See, *e.g.*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 871 (1982) (while defendant "may face a difficult task in making a showing of materiality, the task is not an impossible one"); *Weatherford* v. *Bursey*, 429 U.S. 545, 556-557 (1977) ("[n]or do we believe that * * * the difficulties of proof will be so great that we must always assume * * * that [the government's violation] has the potential for detriment to the defendant"). In fact, the court of appeals' assumption is refuted by the district court's opinion in this case, which demonstrates that the potential prejudice from a Rule 6(d) violation can be analyzed conscientiously and reliably. And, as discussed above (see pages 24-27, *supra*), per se dismissal is not necessary to ensure compliance with applicable grand jury procedures; other, more tailored remedies are available that, by focusing on the prosecutor who is responsible for the violation, do not interfere with the societal interest in the enforcement of the criminal law.[61] If the court of appeals' analysis were adopted, there would be little left in the grand jury area of the principle that only substantially prejudicial errors are cognizable on appeal.[62]

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[60] Because most Rule 6(d) violations are by their nature unlikely to have had any prejudicial impact on the grand jury's charging decision, the "difficulty" in showing prejudice seems to us little more, in general, than the difficulty of showing anything else that does not in fact exist.

[61] We note in particular that a court's supervisory power—which the court of appeals did not even purport to rely on here—does not justify a rule of per se dismissal in the absence of prejudice. See *United States* v. *Hasting*, 461 U.S. at 505-507; *United States* v. *Morrison*, 449 U.S. at 366 n.2; see also page 43 note 56, *supra*.

[62] As Judge Wilkinson pointed out in his dissent (Pet. App. 10a (footnote omitted)), the "truly difficult burden on the defendant" is not the proof of prejudice but the "detection of all Rule 6(d) violations" in the first place, and the "per se rule does nothing to lighten [that difficulty]." And the reverse is also true: such violations of Rule 6(d) as do occur can come to light in a number of ways apart from defense motions to dismiss (let alone motions to dismiss in the absence of prejudice). See pages 24-25, *supra*. Moreover, in other areas, the Court consistently followed a standard of prejudice even where the underlying violation might be difficult to discover. See, *e.g.*,

The district court in this case also noted (Pet. App. 45a) the argument that the issue of actual prejudice "would require a detailed inquiry that inevitably frustrates and undermines the secrecy of grand jury testimony" and "would impose upon the court a difficult burden that would outweigh the benefits to be derived." We believe that these considerations lend support to our submission in Part I, *supra*, that procedural irregularity in the grand jury should not be a basis for dismissing an indictment because the substantial systemic costs of permitting the remedy of dismissal are not justified by the marginal or nonexistent benefits that would result for the criminal justice process. However, if this case is not disposed of on those grounds and the issue of prejudice is therefore to be addressed, the concerns noted by the district court do not call for a rule of per se dismissal without regard to the harmfulness of the Rule 6(d) error.

It is of course true that a burden is imposed by the general requirement that a court assess the prejudicial effect of a violation before granting relief to a criminal defendant; it would undoubtedly be more expeditious, once a violation has been found, to proceed to decision without undertaking a further inquiry into whether the violation was prejudicial or harmless. But the rules of prejudicial and harmless error recognize that other important considerations counsel against the dismissal of an indictment or the reversal of a conviction unless the substantial rights of the defendant to a fair and accurate process were infringed. In the Rule 6(d) context as elsewhere, an examination of prejudice is warranted both by the overriding inefficiency of duplicating a proceeding that was not adversely affected by the legal error and by the need to maintain a balanced criminal justice system that does not allow nonprejudicial defects to frustrate the substantial public interest in effective law enforcement.

United States v. *Bagley*, *supra*, and *United States* v. *Agurs*, 427 U.S. 97 (1976) (*Brady* violation); *Weatherford* v. *Bursey*, *supra* (access to attorney-client information by undercover government informant).

Moreover, we see no reason why the district court's concerns should prove to be more significant or problematic in Rule 6(d) cases than in other cases involving a wide range of grand jury issues in which courts have adhered to a standard of prejudicial error. Indeed, given the unlikelihood that a violation of Rule 6(d) would have impaired the grand jury's determination of probable cause (see pages 21-22, 29-31, *supra*), it would be highly incongruous to conclude that Rule 6(d) necessitates a special remedy of per se dismissal that is not applicable to other grand jury errors.[63]

B. The Defendants Were Assuredly Not Prejudiced By The Agents' Joint Testimony Before The Grand Jury

Under its analysis of per se dismissal, the court of appeals did not inquire whether defendants Mechanik and Lill had been prejudiced by the joint grand jury testimony of Agents

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[63] Because *Latham* v. *United States*, *supra*, is the only case (prior to this one) in which a conviction has been reversed for a Rule 6(d) violation (even there Rule 6(d) was an alternative ground for decision), and because subsequent opinions have heavily relied on *Latham*, we briefly note that that decision has been overtaken by more recent developments in the law. First, *Latham* was decided prior to the adoption of the Federal Rules of Criminal Procedure in 1946. Moreover, the per se approach was "first adopted * * * when transcripts were unavailable and unauthorized presence therefore was one of the few grand jury irregularities that could readily be raised by the defendant" (2 W. LaFave & J. Israel, *supra*, at 333 (footnote omitted)); thus, from the beginning, *Latham* was not sought to be harmonized with other features of grand jury law, and it essentially has been superseded by later developments. Most importantly, *Latham* was decided in a bygone day when courts were " 'impregnable citadels of technicality' " (*Hasting*, 461 U.S. at 509 (citation omitted)), and the opinion in *Latham* shows that the court considered the existence of a violation to be sufficient without more to require reversal. Indeed, the court specifically relied (226 F. at 424) on the then-extant statute that directed courts not to invalidate indictments or judgments "by reason of any defect or imperfection *in matter of form only*, which shall not tend to the prejudice of the defendant" (Rev. Stat. § 1025 (1873 ed.) (emphasis added)); construing this provision, the court held that the presence of an unauthorized person in the grand jury room was "a matter of substance" (266 F. at 424), not merely an "irregularity or informality" that could be treated as a matter of form (*ibid.*), and therefore that an absence of prejudice was irrelevant. This reasoning has no continued vitality, of course, under contemporary principles of prejudicial and harmless error.

Rinehart and James. However, applying the proper standard, it is manifest that no prejudice occurred. Indeed, the district court, upon painstaking analysis of the grand jury record, found that the possibility of actual prejudice was "utterly remote" (Pet. App. 51a). This finding is amply supported in the record, and neither the court of appeals nor the defendants have suggested that it was clearly erroneous.[64]

The violation of Rule 6(d) in this case implicates only tenuously, if at all, the policies underlying the Rule: preserving the secrecy of the grand jury proceedings and avoiding intimidation or undue influence upon witnesses or grand jurors by the presence of unauthorized persons. Here, the secrecy of the grand jury was not realistically threatened, since both agents had full access to all grand jury materials pursuant to Fed. R. Crim. P. 6(e)(3)(A)(ii). Thus, their joint testimony would not have revealed information to either of the agents that would not otherwise have been properly disclosable to them. Moreover, because grand jury material had been furnished to them under that Rule, the agents were obligated "not [to] disclose matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(2). Accordingly, while witnesses are not normally subject to the rule of grand jury secrecy (see Pet. App. 40a; page 27, *supra*), Agents Rinehart and James were not free to make unauthorized disclosures of any grand jury information to which they were privy. See also *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983) ("[w]itnesses are not under the prohibition [of grand jury secrecy in Rule 6(e)(2)] unless they also happen to fit into one of the enumerated classes"). In these circumstances, as the district court found (Pet. App. 40a), "[r]ealistically * * * the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case," and it has never been contended that grand jury secrecy in fact was breached by the agents.

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[64] This is not to say that the punctilious analysis of the district court in this case would be necessary to establish that no prejudicial error had occurred. As the following discussion indicates, the finding of harmlessness here went well beyond that which is required.

Similarly, the risk that the joint appearance might have influenced the testimony of the agents or intimidated the grand jurors was, to say the least, remote. Agents Rinehart and James "were in command of the entire investigation" (Pet. App. 41a), and it is inconceivable that their joint testimony involved any information that was not already known to both of them. Furthermore, because of the agents' access to all of the grand jury materials, each of them was aware that the transcript of his testimony could be seen by the other; to the extent there was any possibility that the presence of one agent could have affected the testimony of the second agent—and, once again, no assertion has been made that this was in fact the case—it would have been no more inhibiting than the knowledge that the transcript of the testimony would have been available to be reviewed.[65]

Nor is it plausible that the grand jurors could have been intimidated by the presence of the one additional agent. Agents Rinehart and James were not strangers to the grand jurors; prior to their joint appearance, each "had either been previously sworn as an agent of the grand jury or had previously testified individually before the grand jury" (Pet. App. 41a). Moreover, while it is possible in the abstract that to some limited degree "the joint witness approach tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of [each agent]" (*ibid.*), as the district court believed, it is not at all obvious why the grand jury would not in fact have been in a better position to evaluate credibility and personal knowledge by observing the interaction of the two witnesses giving testimony together.[66] But be that as it may, it is clear that this technical violation of Rule 6(d) was not such a substantial deficiency in the grand jury process that, under a standard of prejudicial error, it invalidates the indictment.

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[65] The only likely effect of the agents' joint presence would have been the prompt correction of any inadvertent misstatements that might have been made.

[66] In this respect, the issue of simultaneously testifying witnesses may be different from other problems involving the presence of unauthorized persons under Rule 6(d).

In our view, the foregoing discussion is sufficient to show that the court of appeals erred in reversing the conspiracy convictions of Mechanik and Lill. But there are further circumstances here that compellingly demonstrate that the Rule 6(d) violation could not have been prejudicial error.

First, the joint testimony in this case related only to a superseding indictment, which, insofar as relevant, made certain modifications in the conspiracy count in an earlier and indisputably valid indictment. It is simply untenable to conclude that these changes, even if attributable to the agents' joint testimony, were so significant that the entire charge—including the slightly less detailed conspiracy charge in the first indictment—should be invalidated. Cf. *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985). It is quite plain that the conspiracy counts in both indictments involved one and the same offense. Indeed, even without the superseding charge, the government could have proceeded to trial on the first indictment and properly proved the unalleged overt acts that were added in the second indictment.[67] In these circumstances, the Rule 6(d) violation is scarcely a sufficient basis for throwing out the conspiracy count.

Beyond this, the district court found, on the basis of a meticulous examination of the record, that every "alteration[ ] and addition[ ] to the conspiracy count * * * [material to the conspiracy charge against Mechanik and Lill] was * * * supported by testimony apart from the Rinehart/James joint testimony" (Pet. App. 47a). Thus, "[i]nsofar * * * as the joint testimony of Agents Rinehart and James ultimately proved to be material, the grand jury also had before it ample independent evidence to support a probable cause finding of the charges" (*id.* at 51a). Based on this separate and untainted evidence, the district court was able to find that "the grand jury would * * * undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately" (*ibid.*). There is no

[67] See, *e.g.*, *United States* v. *Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979); *United States* v. *Elliott*, 571 F.2d 880, 911 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Harris*, 542 F.2d 1283, 1300 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977).

basis either in the Federal Rules or in common sense to invalidate an indictment that is fully supported by probable cause independent of the Rule 6(d) violation. Cf. *Nix* v. *Williams*, No. 82-1651 (June 11, 1984). A contrary result would be a profligate expansion of the legitimate procedural protections that our legal system affords to criminal defendants.[68]

[68] Even if the court of appeals were correct in applying a standard of per se dismissal to reverse the conspiracy convictions, it would not follow, as Mechanik and Lill assert, that the court erred in affirming their substantive convictions. In all relevant respects, these substantive counts in the first and second indictments were identical. Accordingly, the issue as to those counts is not one of prejudice but rather of causation; the Rule 6(d) violation in connection with the superseding indictment did not cause or contribute to the substantive charges that in fact had already been included in the initial, untainted indictment. Suppose the grand jury had originally charged the defendants in two indictments, one containing the substantive counts and the other the conspiracy count, and had then returned a superseding conspiracy indictment following the joint testimony of the DEA agents. It would be frivolous to contend that the error in the joint testimony could in any way upset the unchanged and preexisting substantive indictment. The present situation is no different in substance and calls for no different result. See also *Peterson* v. *Air Line Pilots Association*, 759 F.2d 1161, 1166 n.13 (4th Cir. 1985), petition for cert. pending, No. 85-321 (in *Mechanik*, "a superseding indictment deemed defective was held, in effect, to have revivified portions of the original indictment not suffering the malaise infecting the superseding indictment").

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it reversed the conspiracy convictions and affirmed insofar as it affirmed the substantive convictions.

Respectfully submitted.

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REPLY

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Supreme Court of the United States

October Term, 1984

MARSHALL MECHANIK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

JEROME OTTO LILL,
Petitioner,

v.

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UNITED STATES OF AMERICA,
Petitioner,

v.

MARSHALL MECHANIK, ET AL.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Rule 6(d) Federal Rules of Criminal Procedure 1, 2, 3, 4, 6

WHEN THE PROSECUTION VIOLATES RULE 6(d) AND THEN MISREPRESENTS THEIR COMPLIANCE WITH THE ONLY RULE GOVERNING GRAND JURY PROCEDURE AT THE PRETRIAL STAGE, DISMISSAL OF THE INDICTMENT IS THE ONLY APPROPRIATE REMEDY.

Simply stated, the only issue which this Court need decide is whether the entire indictment should have been dismissed when Federal Rule of Criminal Procedure 6(d) was violated and pre-trial judicial determination of the issue was stifled by the prosecution. The Government needlessly complicates this case by inviting the Court to examine the Rule 6(d) violation in the context of a "procedural irregularity" followed and dwarfed by the uninfected trial and conviction. In doing so, the Government ignores the basic fact that had the Government responded accurately regarding the Rule 6(d) violation prior to trial, the entire superseding indictment would have been dismissed. *United States v. Lill*, 511 F.Supp. at 51 (S.D. W.Va. 1980).

The issue before this Court, the remedy for violation of Rule 6(d), must be first examined in light of the record in this case, without regard to the events that occurred following the Government's misrepresentation of compliance with Rule 6(d). Ironically, the Government suggests pretrial prosecutorial notification or certification to the dis-

trict court that the rules have been observed, as a remedy that would insure prospective compliance with Rule 6(d). (Gov't. Brief pages 12 and 25). Consideration of the trial and convictions obtained, in fashioning the remedy in this case, rewards the prosecution for the pre-trial misrepresentation of their compliance with Rule 6(d) in the face of the prosecution's clear violation and their pushing the case to trial without disclosure to the judge of the violation.

The Government argues (Gov't. Brief page 15) that a violation of Rule 6(d) cannot form the basis for dismissing an indictment. The logical consequences of the Government's argument would, at worst, abrogate the constitutional function of the grand jury as an investigative body independent of coercive control by the Government, and, at best, would require this Court to judicially render meaningless the strictures of Rule 6(d). No policy argument, and certainly no case cited by the Government, requires such results.

The Fifth Amendment to the Constitution provides for the grand jury. Its integrity must be maintained for the grand jury to discharge its duties. The grand jury is dependent upon the prosecutor to comply with Rule 6(d) in presenting the evidence. Absent its integrity, the grand jury cannot properly perform its screening functions either to discover and present persons for trial or to protect citizens against arbitrary governments actions. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

Federal Rule of Criminal Procedure 6(d) is one of the keystones to preserving the integrity of the grand jury system. Only one witness is allowed in the grand jury room at one time so the Government cannot simply overwhelm the grand jurors. See *United States v. Echols*, 542 F.2d 948, 951 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977). If the Government is correct, the Rule 6(d) prohibition would simply disappear. Dismissal of the indictment for a violation of Rule 6(d) is required to maintain the appearance, as well as the actuality, of propriety[1]. Nor can there be a "windfall" to a defendant, as the Government suggests (Br. 33), where the Government merely follows the strictures of due process. The only "windfall" which this Court can confer in this case is upon the Government.

If the Government prevails in this case, then all it needs to do to insulate abuses of the grand jury system is keep such abuses hidden until after the trial begins! Once trial begins, according to the Government (Br. 33-35), the doctrine of harmless error applies, and it is extremely unlikely that the indictment will then be dismissed, because the only prejudice is the existence of the trial itself, and that is not objectionable since the existence of the trial itself cures the abuse. The Government's argument is bootstrapping on a grand scale, and should not be judicially en-

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[1]The Government has failed to consider in its cost-benefit analysis approach to choosing a proper remedy for a violation of Rule 6(d) (Br. 20-27), the "costs" of such violations to the grand jury system itself, and the benefits to society through a fair and even application of the due process of law. In addition, the Government has also overstated the "costs". The Court has recognized that reversal of a conviction and dismissal of an indictment where the integrity of the grand jury has been undermined is not at all a drastic remedy, because the accused can be reindicted and tried. *Rose v. Mitchell*, 443 U.S. 545, 557-558 (1979). It certainly is far more drastic to undermine a thousand years of legal development by judicially altering the grand jury system.

dorsed. An incentive for the Government to abuse the process must be contrary to public policy as abhorrent to the notion of due process of law.

In determining the proper remedy, this Court must certainly weigh the attendant costs and benefits. Conspiciously absent from any cost benefit analysis suggested by the Government in their brief is the consideration that one cost attendant upon applying a harmless error test in this case is the reward to the prosecution for their pretrial misrepresentation. Also conspiciously absent from the Government's argument is the benefit, resulting from per se dismissal without prejudice, to the criminal justice system that the only rule in place controlling the prosecution has a remedy of sufficient strength to encourage compliance by the party charged with the significant responsibility of presenting the case to the grand jury. Per se dismissal, in this case, is the only remedy enforceable without endorsing a procedure that otherwise jeopardizes secrecy or requires inquiry into the evidence presented to the grand jury. *Costello v. United States*, 350 U.S. 359 (1956).

No case cited by the Government even comes close to sanctioning the result sought by it. The four recent lower court cases the Government uses (Br. 44) to support its argument are inapposite. *United States v. Kazonis*, 391 F. Supp. 804 (D. Mass. 1975), aff'd, 530 F.2d 962 (1st Cir.), cert. denied, 429 U.S. 826 (1975), did not concern a violation of Rule 6(d). The other three cases, *United States v. Rath*, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969); *United States v. Kahan & Lessin Co.*, 695 F.2d 1122 (9th Cir. 1982); and *United States v. Condo*, 741 F.2d 238 (9th Cir. 1984), cert. denied, No. 84-5793

(Jan. 14, 1985), concerned brief, unintentional interruptions of the grand jury (*Rath* and *Kahan & Lessin Co.*) or a "fleeting" appearance in the grand jury room by a person assisting in the movement of bulky documents (*Condo*). None of these cases involved the presentation of more than one witness to the grand jury.[2]

The Government's primary reliance upon *Costello v. United States*, 350 U.S. 359 (1956), and *United States v. Morrison*, 449 U.S. 361 (1981), also is misplaced. In *Costello*, this Court ruled that it was proper for a grand jury to return an indictment based upon hearsay evidence. The use of hearsay evidence does not affect the integrity of the grand jury, nor does it subvert the role of the grand jury as an independent decision maker. The rule sought by the Government would do both these things.

United States v. Morrison, supra, merely stands for the proposition that "remedies should be tailored to the injury suffered . . ." *Id.*, at 364. In that case, the respondent moved to dismiss her indictment on grounds that, subsequent to her indictment, two Drug Enforcement Agency agents violated her Sixth Amendment right to counsel. The respondent entered a conditional plea of guilty, and the court of appeals reversed the conviction. This Court reversed the court of appeals, holding that dismissal of the indictment was not the proper remedy for a Sixth Amend-

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[2]It is possible that these cases were mischaracterized by the courts which decided them, since a brief, inadvertent intrusion into the grand jury room may not constitute a violation of Rule 6(d), at all. This must have been implicitly recognized by the court of appeals below when it distinguished this case from *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (1982), cert. denied, 459 U.S. 1105 (1983).

ment violation which "had no adverse impact upon the criminal proceedings." *Id.*, at 367. We agree. Unlike this case, the violation in *Morrison* had nothing to do with the grand jury. The violation by the Government of a right unconnected with the grand jury, which violation occurred after the indictment was handed down, was properly considered in terms of the trial, and not as a violation of the grand jury system. Hence, the proper scope of inquiry was prejudice to the respondent. In this case, the Government abused the grand jury itself, and, therefore use of the *Morrison* analysis is inapproproiate.

The case most like this one is *Rose v. Mitchell*, 443 U.S. 545 (1979). Despite the best efforts of the Government (Br. 34-39) to distinguish this case from *Rose*, both cases present the principle that an indictment must be dismissed when the Government has tampered with the concept of fundamental fairness and the integrity of the grand jury.[3]

As in *Rose*, the Petitioners here raised the grand jury issue prior to trial; it was not their fault that a trial on the flawed indictment occurred. Hence, reversal of the conviction is required, in addition to dismissal of the indictment, only because the trial occurred in error. A breach of the integrity and independence of the grand jury cannot be "cured" by a subsequent trial.[4]

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[3]That principle also underlies the decision in *Costello v. United States*, 350 U.S. 359, 362 (1956).

[4]The Government is just plain wrong (Br. 35) when it contends there is no "unbroken line of cases" establishing a precedent for violations of Rule 6(d). We have cited such a line of cases (Br. 10, N. 9), holding that the presence of an unauthorized person in the grand jury room for any significant duration of time mandates dismissal of the entire indictment.

Accordingly, the judgment of the court of appeals should be affirmed insofar as it reversed the conspiracy convictions, and reversed insofar as it affirmed the substantive convictions.

Respectfully submitted,

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